Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1974

No. 74-381

JIM L. NAPPER, ET UX.,
Petitioners

v.

ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ETC., ET AL.,
Respondents

Petition For A Writ of Certiorari
To The
Supreme Court of Arkansas

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It may not be of much importance to anyone other than the plaintiff here and his family whether this case is tried on its merits or not. To my mind, however, it is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to lawyers whose names are accredited as worthy and capable by their government. I fear that this case is not likely to stand out in the future as the best example of American justice.

LINK *v.* WABASH RAILROAD CO.

BLACK, J., dissenting.

370 U.S. 626, 649 (1962)

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IN THE

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No. _____

October Term, 1974

JIM L. NAPPER, ET UX.,

Petitioners

v.

ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ETC., ET AL.,

Respondents

Petition For A Writ Of Certiorari
To The
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Petitioners, Jim L. Napper and wife, Jo Ann Napper, complain of respondents, Anderson, Henley, Shields, Bradford and Pritchard, a partnership of L. W. Anderson, William B. Henley, Jr., Charles O. Shields, Addison Bradford, Jr., William A. Pritchard and C. A. Searcy Miller, each of them sued

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Notation: Unless otherwise indicated, all emphasis has been supplied by petitioners.

individually and as member of defendant partnership and petition for the issuance of a writ of certiorari to the Supreme Court of Arkansas to review the judgments and orders entered in that Court in its cause No. 74-77 wherein petitioners were appellants and respondents were appellees.

OPINIONS BELOW

Petitioners complain of a grossly unfair dismissal of their appeal to the Supreme Court of Arkansas. No opinions of any kind were written by the Courts below. The Appendix contains copies of opinions in the related cases of Napper v. Johnson, 464 S.W.2d 496(Tex.Civ.App.1971)(A.7-9)[1] and

1. In referring to the record of proceedings in the Courts below, petitioners will employ the following abbreviations: (A-), Appendix attached to the rear of this petition; (C.), Circuit Court Transcript, proceedings in the Circuit Court, Pulaski County, Ark., filed in the Ark.Supreme Ct. as transcript Vol.I; (D.), District Court Transcript, proceedings in the U.S. District Court, E.Dist.Ark., filed in the Ark. Supreme Ct. as transcript Vol.II; (M.Dis.), Motion to Dismiss, filed by respondents, Ark.Supreme Ct.;(Apt.Ans.), Appellants' Answer thereto, etc., filed by petitioners, Ark.Supreme Ct.; (Ape.Res.), Appellees' Response, filed by respondents, Ark. Supreme Ct.; (A&B), Abstract and Brief of Appellants, filed by petitioners, Ark.Supreme Ct.; (Pet.Reh.), Petition for rehearing, filed by petitioners, Ark. Supreme Ct.

Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 5 Cir. Slip Op. 74:7818 (Sept. 16, 1974)(A.10-15).

JURISDICTION

The order of the United States District Court remanding the case to the Circuit Court of Pulaski Co., Ark. (A-1) was dated May 9 and filed May 10, 1973. The order of the Circuit Court of Pulaski County, Arkansas quashing service (A.1-2) was dated and entered November 15, 1973. The orders of the Supreme Court of Arkansas dismissing appeal (A-4) and denying (A-5) a timely petition for rehearing (A.4-5) were respectively dated and entered April 29th and May 28, 1974.

On August 24, 1974 and within 90 days of the petition for rehearing, Mr. Justice Blackmun signed an order extending petitioners' time to petition for certiorari to and including September 26, 1974 and on September 26, 1974 Mr. Justice Blackmun signed another order further extending petitioners' time to and including October 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

QUESTIONS PRESENTED

This is an action for legal malpractice in which the Trial Court sustained the

defendants' motion to quash service of process. The plaintiffs, these petitioners, obtained from the State Trial Court an order extending time to docket an appeal in the Arkansas Supreme Court. The appeal was, in fact, docketed within the time specified in the extension order. In securing the extension, petitioners placed reliance upon a rules pamphlet supplied by the Supreme Court Clerk which, unknown to petitioners' counsel, was out of date. Even though respondents claimed no prejudice and could not have been prejudiced thereby, the Arkansas Supreme Court, in effect, refused to honor the trial court's extension order and dismissed the appeal. Under any possible construction of the record, the case had been delayed no more than 18 days. Petitioners submit that the dismissal order was fundamentally unfair and served neither a valid nor a compelling state interest. If necessary, they would argue that the dismissal order has no rational basis and that the same is invidiously discriminatory.

The Constitutional authorities on which petitioners place primary reliance are Lindsey v. Normet, 405 U.S.56(1972), Yick Wo v. Hopkins, 118 U.S.356(1886) , Hovey v. Elliott, 167 U.S.409(1897), and Societe Internationale v. Brownell, 357 U.S.197 (1958). Petitioners urge that a Constitutional deprivation lies in the following factors, especially when they are taken together and considered in the overall:

(1) Arkansas has adopted a version of the Federal Rules whereby the Court has

been authorized by statute to exercise "sound discretion" in granting or overruling motions to dismiss appeals for alleged irregularities in the prosecution thereof.

(2) Having been authorized to exercise "sound discretion" in this respect, it is submitted that the Court has a duty under the Fourteenth Amendment to exercise its discretion in a reasonable manner. But, the Court uniformly refuses to do so.

(3) All jurisdictional steps had been complied with and this appeal had been docketed. It could be disposed of only by the affirmative act of the Court. The Court had a Constitutional obligation not to act arbitrarily; arbitrarinous being measured by the surrounding circumstances.

(4) This appeal raises substantial questions as evidenced by the opinions of the United States District Court and the Texas Court of Civil Appeals.

(5) The dismissal order is a fine, penalty or forfeiture in its entirety for reason that respondents claimed no prejudice by reason of petitioners' delay, none is apparent, and the Court made neither inquiry nor findings of prejudice in connection with its dismissal.

(6) Further, there could have been no prejudice to respondents because, even disregarding the disputed extension order signed by the Trial Court, petitioners acted within the overall time allowed by applicable state law.

(7) The Court is punishing the individual plaintiffs-appellants-petitioners, Mr. and Mrs. Napper, who are personally innocent of any wrongful conduct. Yet, it is they who must pay the extreme penalty of having their case dismissed.

(8) Beyond doubt, petitioners' attorneys acted in good faith and obviously believed that a valid extension order had been granted. Clearly, no intentionally dilatory tactics were involved.

(9) Petitioners' attorneys were trapped by the act of the Court's own clerk in providing an out-of-date rules pamphlet to petitioners' counsel.

(10) The Trial Court (unwittingly, we are sure) helped to induce the delay in question and lulled petitioners' attorneys into a false sense of security by granting an extension which the Supreme Court has refused to recognize.

(11) In final analysis, this dismissal order constitutes a $75,000 fine, levied upon wholly innocent persons, not only for the lack of skill or diligence of their attorneys but for the acts of the Clerk of the Supreme Court and the Trial Court Judge.

FIRST QUESTION:

Did the order of the Arkansas Supreme Court dismissing petitioners' appeal violate the due process and equal protection clauses of the Fourteenth Amendment under the circumstances above discussed?

SECOND QUESTION:

In the light of the foregoing factors, did the Supreme Court of Arkansas violate the due process and equal protection clauses of the Fourteenth Amendment by failing and refusing to consider alternative measures, less harsh and less onerous, which are readily available in order to enforce compliance with the rules and statutes relating to appellate practice?

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The United States Constitution, Amendment XIV, Section 1:

"* * *Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ark.Stats.Ann., §27-2106.1(Acts, Ark.Leg. 1953, No.555, §2):

"NOTICE OF APPEAL * * *. Any party to the action may appeal * * * by filing * * * a notice of appeal within thirty (30) days * * *. Failure of the appellant * * * to take any of the further steps to secure the review of the judment * * * appealed from shall not affect the validity of the appeal * * *, but shall be ground only for such action as the appellate court deems

appropriate which may include dismissal * * *."

Rule 73(a), Fed.R.Civ.Proc., (Effective September, 1938; abrogated as of July, 1968 when substantially identical provision adopted as Rule 3, Fed.R.App.Proc.):

"APPEAL TO A COURT OF APPEALS * * *. The time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from * * *.

"A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule, or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. * * * " (Rule quoted as it stood in 1953 subsequent to 1948 and 1949 amendments and prior to 1966 amendment.)

Ark.Stats.Ann., §27-2127-1(Acts, Ark.Leg. 1953, No.555, §20)(Underscored portion was added to the Statute by Acts, Ark.Leg.1971, No. 206, §1):

"TIME FOR FILING RECORD AND DOCKETING APPEAL.-The record on appeal shall be filed with the appellate court and the appeal there docketed within ninety (90) days from the date of filing the notice of appeal; except that, a trial court may prescribe

the time for filing and docketing, which in no event shall be less than ninety (90) days from the date of filing the first notice of appeal. In all cases where there has been designated for inclusion any evidence or proceedings at the trial or hearing which was stenographically reported, the trial court, after finding that a reporter's transcript of such evidence or proceeding has been ordered by the appellant, in its discretion and with or without motion or notice, may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or extended by a previous order; but the trial court shall not extend the time to a date more than seven (7) months from the date of the entry of the judgment or decree."

Rule 73(g), Fed.R.Civ.Proc., (Effective September, 1938; abrogated with an effective date of July, 1968 when superseded by similar provisions of Rule 11(a) and (d), Fed.R.App.Proc.):

"DOCKETING AND RECORD ON APPEAL. The record * * * shall be filed with the appellate court and the appeal there docketed within 40 days from the date of filing the notice of appeal; * * * in all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as

originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal."

Rule 26A, Ark.Sup.Ct.:

"EXTENSION OF TIME FOR APPEAL. Effective August 1, 1973, in the absence of a showing of unavoidable casualty all appellate records must be filed with the clerk in compliance with Act 206 of 1971 (Ark. Stat.Ann., §27-2127-1(Supp.1971), which provides that a trial court may extend the time allowed for the docketing of an appeal if the court (a) finds that the extension is related to the inclusion in the record of evidence stenographically reported and (b) enters the order of extension before the expiration of the period for filing and docketing as originally prescribed or extended by a previous order. Counsel seeking such an extension of time shall give to opposing counsel notice of the application for an extension of time."

STATEMENT OF THE CASE

HOW FEDERAL QUESTION WAS PRESENTED BELOW

Petitioners' federally guaranteed rights were invaded by the unfair and arbitrary dismissal order of the Arkansas Supreme Court. Where the denial of the federally

protected right occurs in the State's highest court, a party is not required to present his federal question to the Court below. Cole v. Ark., 333 U.S.196(1948), Brinkerhoff-Faris Trust Co. v. Hill, 281 U. S.73(1930). Nevertheless, petitioners did on May 15, 1974 file a timely petition for rehearing (A.4-5) in the Arkansas Supreme Court expressly contending that the dismissal order "is contrary to * * * U.S. Const., Amdt.XIV, §1" presenting the same propositions here argued and urged that "the dismissal deprives Constitutional rights of Due Process and Equal Protection." Several decisions of this Court were cited and argued (Pet.Reh.1-2). This petition was denied on May 28, 1974 (A-5).

THE ORIGINAL CONTROVERSY

On January 25, 1969, petitioners, being in strained financial circumstances, were induced to enter into an oppressive transaction by which they were required to transfer apparent title to their property located in Dallas County, Texas to one Earl B. Johnson as security for a loan of only a fraction of its value. When they attempted to redeem their property with interest, the said Johnson refused to reconvey it, speciously contending that petitioners were one day late. Petitioners brought suit against Johnson in the state court at Dallas, Dallas County, Texas. A defendant's judgment was reversed on appeal, Napper v. Johnson, 464 S.W.2d

496(Tex.Civ.App.1971)(A.7-9).[2] During the trial of the Johnson case, it was brought out for the first time that a member of the law firm, in which petitioners had been induced to repose their trust and confidence, had made an under-the-table deal by which, they, the lawyers, could and did acquire a one-half interest in petitioners' property (C.28-30).

On June 9, 1971, petitioners filed the present lawsuit in the Circuit Court of Pulaski County, Arkansas alleging fraud and legal malpractice (C.1). They alleged actual damages of $75,000 (C.3). The Texas Court stated that the value of the property lost to petitioners was $50,000-$60,000 (A.9). Respondents immediately removed the case to the United States District Court for the Eastern District of Arkansas filing an affidavit that "Jim L. Napper and Jo Ann Napper were and are citizens of the State of Arkansas" and respondents were citizens of Texas (C.11). Petitioners had obtained service (C.8) under the Arkansas long-arm statute, Ark.Stat.Ann., §27-2501-

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2. That case was re-tried beginning July 16, 1973. On December 18, 1973, the Texas trial court held that the jury's answers to the special verdict were in irreconcilable conflict and declared a mistrial. On December 31, 1973, defendant Johnson, through his attorneys, these respondents Anderson, Henley, Shields, Bradford and Pritchard, gave notice that he would petition the Texas Court of Civil Appeals for a writ of mandamus to review the mistrial order. Such petition has not yet been filed.

2507. Immediately after removal, respondents filed their "Motion to Quash"(D.11) contending that they were not amenable to long-arm service. Although respondents' motion was the subject of protracted proceedings, it had never been acted upon at the time of the remand order of May 9,1973, almost two years later (A.1).

Petitioners presented to the federal court extensive evidence of false and fraudulent representations transmitted into the state of Arkansas by mail and telephone where the same were received and relied upon by the petitioners (D.119-133). Respondents, in turn, concentrated upon the contention that physical presence of the defendants in person or by agent is necessary in order to support long-arm jurisdiction (D.11,148). The Arkansas long-arm statute is a counterpart of the Uniform Interstate and International Procedure Act, in effect in approximately eighteen states. Petitioners rely heavily upon the interpretation by the First Circuit of an identical Massachusetts Statute, Murphy v. Erwin-Wasey, Inc., 460 F.2d 661(1-Mass.1972), holding that one who transmits actionable representations into the forum state is subject to long-arm jurisdiction even though he was never physically present in that state. Petitioners also urge Sifers v. Horen, 22 Mich.App.351, 177 N.W.2d 189 (1970),Affd.385 Mich.195,188 N.W.2d 623 (1971), holding that under given circumstances, in an action for legal malpractice, an attorney licensed in state "A" who accepts employment to represent in the courts of state "A", clients residing in state "B",

is subject to long-arm jurisdiction in state "B".

The Federal Court having indicated a ruling in favor of petitioners, respondents suddenly shifted tactics and filed a motion to dismiss the case for want of diversity jurisdiction contending that even though petitioners have resided in Arkansas continuously, save a hiatus of a few months, since 1966, they are "citizens of the State of Texas" because they claim a homestead exemption upon the property involved in this lawsuit (D.249).[3] Following a hearing

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3.

Petitioners say there is nothing inherently inconsistent between a homestead claim and a claim of diversity of citizenship. Upon a proper showing, a party may establish both. The homestead exemption is based on state law and public policy allowing every householder to exempt one piece of property from forced sale. The exemption persists (1) until the claimant purchases other property within or without the State of Texas and establishes it as his homestead or (2) until he forms the definite intention never to return:

"Let him leave for what purpose he may, or be his intentions what they may, provided they are not those of total relinquishment or abandonment, his right to the exemption cannot be regarded as forfeited.

"To constitute an abandonment of a homestead, the claimant must go away with the definite intention not to return; or, we may add, must form such definite intention after going away." Gulf Production Co. v. Continental Oil Co., 132 S.W.2d 552,577(Tex.Sup.1939), rehg.gntd.,opn.wdn,new opn. subs.affg.rather than rvsg. on oth.gnds.,164 S.W.2d 488(Tex.Sup.1942)

(cont'd on following page)

on May 14, 1973, the U.S. District Court remanded the case to Pulaski County[4] making the following remarks into the record:

> "***I must say on the face of it and in the light of the Texas court's decision, that it is a very serious lawsuit, obviously, and it is one that I am sure they will want to have their day in court on it, and they will. The Court is going to remand it to the Court in which the case was filed."
>
> "Although it has nothing to do with the court's decision, an incidental benefit of handling it this way will be that the very difficult question of the 'long arm ' statute, the interpretation by the Arkansas courts of their own 'long arm' statute will be made by Arkansas courts.
>
> "I want to congratulate Mr. Howell on presenting to this court an exceptionally

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(cont'd from preceding page)

On the other hand, federal diversity citizenship is presumed to be at the place of a person's present residence. The fact that one may move away and leave behind real or personal property with the intent of returning whence one came at an indefinite future date does not preclude diversity citizenship in another state. Gilbert v. David, 235 U.S.561(1915). Hardin v. McAvoy, 216 F.2d 399(5-Ga.1954).

4.

The Court's statement of his remand order (C.41-48) is to us, unclear. A single paragraph thereof is quoted in the Fifth Circuit's opinion (A.13). Be that as it may, a remand order is expressly non-appealable, 28 U.S.C.1447(d) and petitioners were forced to return to the State Court.

able brief on that issue, and I might say, although I have an open mind on it, I am inclined to think that the balance was on your [petitioners'] side, although I think, taking the Arkansas cases a little bit further and in the light of what's going to happen today, we won't have to speculate about what the Supreme Court of Arkansas will do or the state courts of Arkansas will do. They will have to make that decision, and so their decision on the question of the Arkansas law will naturally control on that issue.

"So you won't have to worry about having that issue preserved during the course of this trial and then having it presented to the Court of Appeals and have them sitting up there, as I am doing, and trying to speculate as to what the Supreme Court of Arkansas would decide. If there is any appeal at all, it would be to the Arkansas Supreme Court, and that is where you would get a final adjudication of the questions raised by the defendants' motion to quash.

"An order will be entered today remanding the case to the Circuit Court of Pulaski County." (C.49-50)

A complete transcript of the federal court proceedings was made up and filed in the state trial court (A-2). After reviewing the same, and after reading the above quoted remarks of the United States District Judge, the State Circuit Judge on November 15, 1973, sustained defendants' motion to

quash (A.1-2) and petitioners gave notice of appeal (A-2).[5]

THE APPEAL WAS DISMISSED

Back in 1969, when he first encountered difficulties with respondents, the petitioner, Mr. Napper, traveled personally to Dallas, Texas and attempted to negotiate directly with respondents. When they refused to negotiate, Mr. Napper went immediately on the same visit to another Dallas attorney, Charles Ben Howell, and retained him (Apt.Ans.3). From the outset, Mr. Howell has personally handled all of the Napper litigation and has pulled the lead oar in the handling and prosecution of the Arkansas proceedings. He retained an Arkansas attorney, Mr. James R. Howard, to assist him as required, but he continued to draft practically all pleadings and papers in the case for Mr. Howard's approval and signature (Apt.Ans.3-4).

5.

Petitioners had filed a protective action in the United States District Court for the Northern District of Texas on August 23, 1971. This action was dismissed solely on the basis of respondents' plea of "res judicata" and the dismissal was affirmed by the Fifth Circuit, Napper v. Anderson, Henley, Shields, Bradford & Prithcard, 5 Cir.Slip Op.74:7818(Sept.16, 1974)(A.10-15). We regret that the Court of Appeals failed to give express consideration to Res.Jmts.2d,T.D. § 68.1(a) stating that a prior judgment has no "Issue Preclusion" effect against a party who "could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action."

Petitioners' attorneys conferred frequently by telephone and by mail. The state trial court, having indicated that he would rule against petitioners, counsel discussed the situation and decided that an appeal should be taken. It was agreed that Mr. Howell should continue to handle the majority of the load and that Mr. Howard would review his work. Mr. Howard advised Mr. Howell that Mr. Howell could obtain a copy of the Arkansas Supreme Court rules and other information pertaining to appeals by writing to the Clerk (Apt.Ans.4). And on October 22,1973, Mr. Howell wrote from Dallas, Texas to the Clerk of the Supreme Court of Arkansas:

"October 22, 1973

"The Honorable Jimmy H. Hawkins
Clerk of the Supreme Court
Justice Building
Little Rock, Arkansas

"Dear Sir:

"In collaboration with another lawyer, I am contemplating the filing of an appeal in your court. I would appreciate your help with respect to the following:

* * * * * * * * *

"I would appreciate receiving a copy of any pamphlet or mimeograph containing rules, instructions, sample forms, etc. used by your court which you might have available. If you have a standard form for appearance of counsel or docketing statement or such, please also provide me with such forms.

* * * * * * * * *

"Yours very truly,
Charles Ben Howell"
(Apt.Ans.20)

He received the following reply:

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
LITTLE ROCK

JIMMY H. HAWKINS
CLERK
CARL H. BAKER
CHIEF DEPUTY
BETTIE A. STOBAUGH
DEPUTY

October 24, 1973

Mr. Charles B. Howell
601 Lakewood Tower
Dallas,Texas 75214

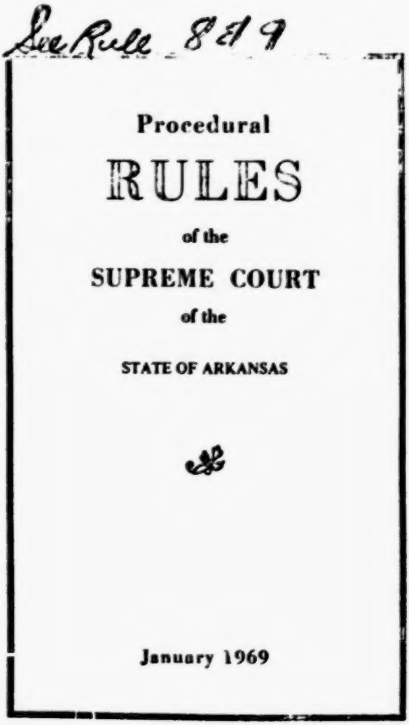
Dear Mr. Howell;

This type brief that you have sent to me does not meet the specifications set up by the Court. I have enclosed a sheet from a brief and this is the size that all printers use in printing Supreme Court briefs.

There is a filing fee of $20,00 for filing transcripts in this Court. I have enclosed you a copy of our Rules.

Sincerely yours,
Jimmy H. Hawkins
Jimmy H. Hawkins, Clerk

Enclosed with the letter was a rules pamphlet with the date of January, 1969 on the cover (Apt.Ans.22):



The pamphlet did not contain and the clerk made no reference to the fact that a new rule, No. 26A (text above), had gone into effect on August 1, 1973 forbidding a trial court to extend the time for the docketing of an appeal unless he finds that the extension is necessary in order to include "evidence stenographically reported" in the record and requiring counsel seeking an

extension to give notice to his opponent.[6]

Mr. Howell also did research in the law library at Southern Methodist University, but the set of books which he used contained out-of-date pocket parts which did not reflect the 1971 amendments to Ark.Stats.Ann., §27-2127.1 (text above), to which Rule 26A is related. Neither did Mr. Howell discover the case of Gallman v. Carnes, 254 Ark.155, 492 S.W.2d 255(1973), to which the court order promulgating Rule 26A was attached. The report of that case was not published in the pocket part annotations to the Arkansas Statutes and circulated until February of 1974. The judgment of the trial court was dated November 15, 1973 and petitioners had 30 days to give their notice of appeal, Ark.Stats.Ann.,§27-2106.1 (text above). However, counsel were anxious to expedite the appeal and on November 23, 1973, Mr. Howell wrote to Mr. Howard requesting him to file the notice of appeal immediately (Apt.Ans.24) and it was filed on November 26, 1973, the eleventh day (A-2). By the same letter, Mr. Howell asked Mr. Howard to obtain the transcript from the clerk immediately to be filed as soon as counsel could see their way clear

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6. It is a common practice for appellate clerks to distribute pamphlets. In the Fifth Circuit, whenever there is a change, mimeographed slips are stapled into the front of the pamphlet. For certain, it is better to distribute nothing at all rather than distribute out-of-date information and set a trap for the unwary.

to meet the briefing schedule of the appellate court. However, the record contained much extraneous material, mostly discovery proceedings filed in the federal court, and counsel were concerned that substantial unnecessary expense would be incurred. It was decided that a specific designation should be filed and the case prosecuted on an abbreviated record (Apt.Ans.4). Mr. Howard examined the papers in the clerk's office and prepared a proposed designation which he forwarded to Mr. Howell on December 28th (Apt. Ans.4,25). At that time, Mr. Howell was engaged in final preparations for the trial of a large multi-party lawsuit which was tried, commencing on January 6th, for a period of almost two weeks. Following that, he was faced with a briefing deadline (as extended) in the Fifth Circuit in the companion case (A.10-15). The appendix and final briefs in that case were filed on January 28, 1974 (Apt.Ans.4-5). Mr. Howell was not entirely satisfied with the designation prepared by Mr. Howard and asked Mr. Howard to review the record to determine exactly what papers were sent from the federal court to the circuit court. Because of Mr. Howard's commitments, and also because of a misunderstanding, this request was not complied with for a considerable period of time. During this entire period of time, both attorneys were busy in the general practice of law, representing two or three dozen clients on assorted matters, making frequent court appearances, and attending to all of the routine matters that are necessary for a general practitioner to handle (Apt.Ans.5).

Various difficulties were encountered, some relating to this case and some not. Mr.

Howell became apprehensive that the ninety day period for filing the record might run out and discussed the possibility of an extension with Mr. Howard. Mr. Howard did not engage in research on the matter because Mr. Howell advised that he had done so. Relying on his previous experience, Mr. Howard stated that he felt an extension should be obtainable. On February 5th, Mr. Howard secured from the Judge of the trial court an order extending the time to docket the case until March 29, 1974 (A-3).[7]

The transcript was completed on March 13th (C.70) and filed with the appellate court on March 14, 1974 (A-3). On March 25th, respondents filed with the appellate court a motion to dismiss (M.Dis.1-4). Anxious not to delay the case, petitioners prepared and filed their abstract and brief with appendix attached and

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7. Mr. Howard's affidavit states that he discussed the extension in advance with his opponent, Mr. Jennings, who agreed thereto and that a copy of the order was immediately mailed to opposing counsel (Apt.Ans.6). Petitioners also contended that it was perfectly obvious that respondents were aware of the extension shortly after its entry because of the circumstances and the manner in which they drew their pleadings and that they purposely waited until after the original 90 day period ran out before attacking the extension order (Apt.Ans.11-14). Respondents filed a "response" to petitioners pleadings and affidavits to which was attached the affidavit of Mr. Jennings stating that he had no "recollection" (cont'd on following page)

timely filed it with the court on April 24, 1974 (A-4). It contains 139 pages, plus 10 index pages and the printing cost was $515.46 (A&B.1-139). The court proceeded to dismiss and deny rehearing, all without opinion. Petitioners moved for clarification so that the United States Supreme Court could have the benefit of the Court's thinking, but the motion for clarification was also overruled (A-6).

REASONS FOR ALLOWING THE WRIT

It is immediately apparent that the petitioners, Mr. and Mrs. Napper, are the most

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(cont'd from preceding page)
of any such conversation with Mr. Howard and no "recollection" of receiving a copy of the extension order. Respondents rather pointedly avoided advising the Court as to exactly when they did first learn of the existence of the extension order (Ape.Res.1-3).

The resolution of this dispute between counsel is not involved in this petition because the statute in effect at that time, Ark.Stats.Ann.,§27-2127.1(p.8,supra) states that the trial court may grant an extension "with or without motion or notice." The only basis for a requirement of notice to counsel is the new Supreme Court Rule 26A, which the clerk omitted to furnish when he complied with counsel's request for a copy of the rules. Note the statement in Gallman v. Carnes, supra, that it had long been "customary for attorneys to obtain extensions of time without notice to opposing counsel and without specifying any reason * * *."

innocent of all the participants in this drama. Yet, it is they, the plaintiffs, who must pay the extreme penalty of having their appeal dismissed, a $75,000 fine. We do not contest the proposition that a litigant is ordinarily bound by the acts and omissions of his attorney. We concede that such rule must apply whenever the court or the opposing party has sustained any material prejudice. However, it is clear that the present dismissal was not remedial; it was a forfeiture, pure and simple. The United States Supreme Court has numerously held that the right of access to the courts is a fundamental right of an ordered society. While the right of appeal itself has never been expressly characterized as fundamental, it has been recognized as an extremely valuable right which may not be arbitrarily or capriciously denied. To say that petitioners' attorneys might through greater diligence have learned of the change in the Court's practice does not obscure the fact that petitioners are being penalized, and drastically so, for delays which the Court's own clerk caused or contributed to cause and which the Trial Court Judge (unwittingly, we are sure) induced. Is this due process of law?

Historically, Arkansas appellate practice was stern and exacting. Most of the steps necessary to prosecute an appeal were declared "jurisdictional" and if there was the slightest delay in complying with the established deadlines, subsequent proceedings were held to be a nullity. All of this was supposedly changed by Acts. Ark.Leg. 1953, No. 555, under which Arkansas purported to adopt appellate procedures patterned after the

Federal Rules of Civil Procedure.--Proceedings: Panel on Appellate Procedure, 8 Ark. L.Rev.1(1953). The following statement turned out to be prophetic:

> "A fundamental purpose of Act 555 is to do away with technicalities that prevent decisions on the merits. If the statute is to be given a legalistic effect, new technicalities will be invented to take the place of the old ones. That discouraging possibility can be avoided only if the Supreme Court makes a positive effort to enforce the new law in the spirit which lay behind its enactment." Id.6

THE UNITED STATES SUPREME COURT HAS UNIFORMLY HELD THAT THE RULES OF APPELLATE PROCEDURE ARE TO BE LIBERALLY CONSTRUED

It has been said that the goddess named "Justice" weeps whenever a litigant is impaled upon some nicety of procedure. It has been argued with equal force that the substantive law would be meaningless unless there were appropriate procedures to implement it. Neither proposition can be accepted as an absolute. Inasmuch as these statutes flowed from the federal courts, a logical place to turn for a reasonable interpretation of them would be the decisions of the federal courts.

This Court has passed upon the question of untimely docketing of the appeal under this rule only one time. Pyramid Motor Freight v. Ispass, 330 U.S.695(1947). Plaintiff waited until the 109th day to request an extension of time to file the transcript and filed the transcript 43 days later. The

Court of Appeals stated "'there was no abuse of discretion in extending the time, despite the somewhat feeble excuses for delay, since the appeal presents a substantial question as to the correctness of the judgment.'" This Court affirmed, stating that the substantiality of the question was an appropriate matter for consideration by the Court of Appeals in weighing an extension request and that the entire matter is within "the sound discretion of the circuit court of appeals."

The Texas Court of Civil Appeals has noted that respondent Pritchard told petitioners that the transaction was a loan, but that it was necessary for petitioners to execute a deed for their property "because of the homestead law" (A- 8). The opinion further notes testimony that "Pritchard had a one-half interest in the transaction from the outset" (A- 9). In the present action, petitioners plead these representations as negligent or, in the alternative, wilful (C.3,9-10). The United States District Judge reviewed the evidence before him and advised petitioners that this "is a very serious lawsuit, obviously, and it is one that I am sure they will want to have their day in court on it, and they will" (C.50). Even though he is an Arkansas lawyer of long experience, His Honor failed to take into consideration the vagaries of Arkansas appellate practice.

These opinions, plus the entire transcript and petitioners' complete abstract and brief, were on file with the Court when the dismissal was entered. But, the Supreme Court of Arkansas gave no weight whatever to the substantiality of petitioners' case. Granted,

it rendered no opinion herein, but such is the clear implication of the principal Arkansas authority on delayed transcripts, West v. Smith, 224 Ark.651, 278 S.W.2d 126 (1955). Further we are unable to find a single delayed transcript case where the Court paid the slightest attention to this factor.

Under both Arkansas and Federal practice, the timeliness of the notice of appeal is a jurisdictional factor while the timeliness of the transcript is not. Even so, there are several decisions of this Court indicating that the rules of procedure relating to appeals are to be construed with liberality.

Hill v. Hawes, 320 U.S.520(1944), is of interest because it also involves a case wherein the clerk contributed to the appellant's dilemma. The trial court there failed to notify appellant's attorney that a judgment had been entered causing him to be late with his notice of appeal. In order to give relief, the trial court set aside its judgment and immediately re-entered it so that a timely notice of appeal could be given. The Court of Appeals held that this was a subterfuge to circumvent the plain provisions of the rule and dismissed. This Court reversed, holding that the trial judge acted "in the exercise of a sound discretion."

In Harris Truck Lines v. Cherry Meat Packers, 371 U.S.215(1962), the trial court, before the 30 days to give notice of appeal had run and upon motion, signed an order extending the time to give notice of appeal. A notice was given within the extended period.

The Court of Appeals held that the rules do not permit such extensions and dismissed the appeal. This Court reversed, stating

> "In view of the obvious great hardship to a party who relies upon the trial judges' finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling."

As we read the decision, the Court says that, even assuming that the trial court had no power to grant the extension, the mere fact that the trial court had chosen to give the extension constituted excusable neglect for failure to act before the unextended deadline. The reasoning is directly applicable to the present case. The Judge of the Circuit Court of Pulaski County saw fit to sign an extension order in favor of petitioners (A.1-2). Certainly, the judge of the circuit court was of the opinion that the extension was lawful and was of the opinion that the extension was warranted. Otherwise, he would not have signed it. The mere existence of the extension order created a trap. Nineteen days of the original 90 days remained on February 5th when the trial court signed the extension order. Undoubtedly, if the order had not been granted, petitioners would have exerted extra effort

to file the transcript before the 90 days ran out. The dismissal order entered by the appellate court penalizes Mr. and Mrs. Napper not only for the mistakes of their own attorneys, not only for the omissions of the Supreme Court Clerk, but for the error of the Circuit Judge as well.

In Bowman v. Loperena, 311 U.S.262(1940), it was held that the trial court is under no obligation to consider an untimely petition for rehearing, but if the trial court elects to do so and rules upon the merits thereof, the time to file a notice of appeal may be counted from the denial of the motion. Thompson v. Immigration Service, 375 U.S. 384(1964), holds to a similar effect.

We would also mention Foman v. Davis, 371 U.S.178(1962), where two notices of appeal were successively filed and the Court of Appeals held them both to be bad. This Court held that they must be considered together and so considering them, no one could be misled as to the intention to appeal:

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'"

* * * * * * * * *

"If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, * * * the leave should ought, as the rules require, be 'freely given.'"

The latter paragraph, while relating to a different subject of procedure, appears to us equally applicable to the matter in hand, whether or not an appeal may be dismissed on account of a procedural fluke.

THE UNITED STATES COURTS OF APPEALS HAVE HELD THAT A LITIGANT SHOULD NOT BE PUNISHED FOR MINOR DELAYS

Substantiality of the Appeal: In the spirit of Pyramid, the Courts of Appeals have often refused to dismiss late transcript cases, even in instances where the appellant was very late. Johnson v. Wilson, 118 F.2d 557(9-Nev.1941)(record many months late; no dismissal because "record presents a strongly arguable claim of error and the delay is not shown to have prejudiced the appellee"), Shannon v. U.S., 206 F.2d 479 (C.A.D.C.1953)(six month delay in filing record), Texas Construction Co. v. U. S., 236 F.2d 138(5-Tex.1956), Maloney v. Hammond, 171 F.2d 225(9-Ore.1948), Brennan v. United Fruit Co., 108 F.2d 710(5-La.1940), Stumpf v. Matthews, 195 F.2d 25(C.A.D.C.1951),

Arline v. Brown, 190 F.2d 180(5-Fla.1951), Christoffel v. U.S., 190 F.2d 585(C.A.D.C. 1950)(several extensions granted, record still not transmitted until 42 days after last extension; held, "to subject to imprisonment without consideration of the substantial questions in the case would be a miscarriage of justice"), Winter v. Crowley, 374 F.2d 317(C.A.D.C.1967)("The merit of the appeal may be of controlling importance.")

The converse of the proposition is illustrated by Olympic Ins.Co. v. Harrison, 413 F.2d 975, 418 F.2d 669(5-La.1969)(record was transmitted 9 days late and appellate court docket fee paid 68 days late) where the Court stated that "in meritorious cases, we can and do overlook irregularities in perfecting the appeal." The appeal was dismissed as having "no possible merit," a strenuous motion for rehearing was filed, the court withheld action and called for briefs. Having reviewed the briefs, the court reaffirmed "that the appeal was without merit" and denied rehearing.

The policy of considering the substantiality of the questions raised before dismissing in late transcript cases has much to commend it. On the one hand, it leaves the appellate court free to dispense substantial justice in serious cases and to quickly dispatch those cases where no serious questions are raised. On the other hand, it does nothing to encourage laxity on the part of the bar in the prosecution of appeals. As we see it, the policy of the Arkansas Supreme Court, in passing on delayed transcript cases, is to throw the good cases out with the bad, wholly

disregarding the intrinsic merits of the appeal, raises a substantial Constitutional question.

Errors of the Clerk: In line with the decision in Hill v. Hawes, supra, the courts have held that the appeal should not be dismissed where the clerk causes or contributed to the delay. Arline v. Brown, supra (clerk inadvertently notified counsel that the record was due on September 30 instead of September 3), Trask v. Tam See, 42 Haw.324(appellant depended upon clerk to secure extension, per local practice), Powers v. Citizens Bank, 329 F.2d 507(6-Ky.1964)(appellate clerk did not timely docket the appeal, the docket fee being misplaced.).

It is always possible in such instances to take the position that counsel should not rely on the clerk and that through the exercise of greater diligence, counsel could have set the matter straight before the deadline. However, the plain facts are that a lawyer cannot carry on his practice without relying in many instances upon the clerk. Where this reliance has caused material prejudice to the opposing party, the courts cannot grant relief. However, in the case at bar, the Arkansas Supreme Court made no inquiry as to prejudice. In effect, the Court has penalized the Nappers for a delay to which its own clerk has substantially contributed. Where the dismissal is not entered for the benefit of the opposing party, but is entered purely as a penalty for failure to strictly comply with the rules, it is submitted that there has been a denial of procedural due process.

Invalid Extension Orders: Likewise, in the spirit of Harris Truck Lines, the Courts have refused to dismiss untimely appeals where invalid or improper extension orders have been secured and relied upon. Burke v. Canfield, 111 F.2d 526(C.A.D.C.1940), Brennan v. United Fruit Co., supra, Mutual Benefit Assn. v. Snyder, 109 F.2d 469(6-Mich.1940), Ainsworth v. Gill Glass Co., 104 F.2d 83(3-Pa.1939), National Surety Corp. v. Williams, 110 F.2d 873(8-Ark.1940), Columbia Lumber Co. v. Agostino, 184 F.2d 731(9-Aska.1950), In re Pramer, 131 F.2d 733(7-Wis.1942).

Even though an extension order may not comply with the law, it nevertheless furnishes proof positive of good faith on the part of the movant for who would be so foolhardy as to procure a worthless extension for purpose of delay. It acts as testimony that the judge signing it thought an extension to be merited, and it absolves the moving attorney from claims of incompetence for the judge who signed it must also have considered it to be within his authority and power. For these reasons, due process requires that they not be lightly cast aside.

ARKANSAS HAS CONSISTENTLY REFUSED TO APPLY FEDERAL DECISIONS TO ITS VERSION OF THE FEDERAL RULES

As stated, the Arkansas Legislature in 1953 substantially revised Arkansas practice by adopting a version of the federal rules. Pyramid and most of the other federal decisions cited above construing those rules were already on the books. However, the Arkansas Supreme Court refused to adopt the

federal practice that had become appended to those rules. Instead, it ruled, by a divided court, that "It is far more reasonable to presume that the Arkansas Legislature enacted Act 555 in the light of our own holdings * * *." West v. Smith, supra. It escapes us why the Legislature would have revised appellate practice at all unless there was considerable dissatisfaction with existing practice. In West, the court declared its intent to continue its previous practice, regardless of the statutory revision. The court further held that a trial court extension order not entered in strict compliance with the statute was an absolute nullity and that the Supreme Court would grant no relief except for "flood, death, riot, act of God, or other great unavoidable casualty that prevented either the filing of the record within time or timely request to the Trial Court to grant extension."

In Southwest Cas.Co. v. Wesson, 226 Ark. 16, 287 S.W.2d 575(1956), the court rejected a case where appellant's attorneys relied upon the promise of the court reporter to obtain an extension stating "no amount of local custom can vary the Statute,* * *".

In Bernard v. Howell, 254 Ark.828, 496 S.W.2d 362(1973), the court rejected a transcript that was delivered to the clerk one day late. The court stated that "very recently" it rejected two similar appeals where the records were respectively tendered three days late and one day late.

Thomas v. Committee "A", 254 Ark.997, 497 S.W.2d 9(1973), is the only reported Arkansas decision allowing delayed filing of the record.

The record was tendered two days late and the court held that the fact that a tornado struck the city where appellant's counsel resided 9 days prior to the deadline constituted the "most extraordinary circumstances" referred to in West v. Smith, supra.[8]

The court rarely publishes opinions when it denies the appeal for tardiness of the transcript. Thomas v. Committee "A", supra. However, the problem is substantial. West v. Smith bears docket No. 5-633 and the opinion on rehearing discusses four other cases similarly circumstanced, Nos. 635, 651, 696 and 687. From the number sequence it would appear that more than 5 cases in 100 or 1 in 20 is denied on the grounds of lateness.

Inasmuch as published statistics are unavailable, we have made inquiry of the clerk. He states that approximately one case per month is denied for late transcript. He states that 310 civil cases were filed in his court during the calendar year 1973. Purser v. Corpus Christi Bank, No. 73-308, is reported at _____Ark._____, 508 S.W.2d 549(1974).

8.

We agree that the two day extension in Thomas was merited, but cannot understand the court's preoccupation with vis majeure. The fact that a storm blew through town did not really "prevent" the filing of the record or a request for an extension, West v. Smith, supra. Counsel was not marooned without a telephone. It did cause him to become very distraught and overworked, an excuse which the court consistently rejects (unless caused by a bad storm). The criteria employed is without rational basis.

If the estimate of one case per month is correct, then approximately one of every twenty-five appellants to the Supreme Court of Arkansas loses his case upon a procedural technicality of which, he, the individual party, is doubtless totally unaware of its existence until advised by his attorney that the appeal has been lost. If the one-per-month estimate is calculated back to the adoption of §27.2106.1 of the Arkansas Statutes providing that "further steps to secure the review of the judgment or decree appealed from shall not affect the validity of the appeal or cross-appeal, but shall be ground only for such action as the appellate court deems appropriate, * * *" we calculate that well over two hundred unfortunate litigants have been wiped out in this manner.

Rule 11(a)(b), Fed.R.App.Proc., measures the timeliness of the record by the date of "transmission" (usually mailing) by the district clerk. However, the Clerk of the Arkansas Supreme Court states that timeliness in his court is measured by the date of actual receipt of the record. See Wallis v. State, 245 Ark.29, 430 S.W.2d 860(1968). Thus, where records are mailed from various points within and without the state of Arkansas, a single day of delay in the mail can be fatal. No statistics are available, but it appears that many of these Arkansas appeals fail on account of one or two days lateness. We can find no cases whatever, but we are confident that any of the federal circuits would label a single day or even two days of lateness as de minimis non curat lex. At the same time, the Arkansas Supreme Court holds in its hand identical authority which it steadfastly

declines to exercise. Does this not raise a substantial constitutional issue?[9]

IN THE PRESENT CASE, THE ARKANSAS SUPREME COURT HAS REFUSED TO EXERCISE THE SOUND DISCRETION THAT HAS BEEN COMMITTED TO IT.

Certainly, under the circumstances shown, a federal circuit court could not have dismissed petitioners' appeal. Such would have been a clear abuse of the "sound discretion" committed to the courts of appeals. Pyramid Motor Freight v. Ispass, supra.

The Arkansas Supreme Court is empowered to exercise that same "sound discretion" by

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9. The clerk advises that there were also 174 criminal appeals in his court during 1973. For the decision in Cause No. CR73-171, see Prather v. State, ___Ark. _____, 509 S.W.2d 309(1974). He states that whenever the record in a criminal case is a few days overdue, the Court always allows the late filing "because the Federal Courts make them take it." We agree that there are special considerations in cases involving human liberty whenever they are meritorious. (We also might observe the well known fact that many criminal appeals are primarily motivated by the defendant's desire to remain on bail as long as possible.) But we cannot comprehend the logic of the Court's position in being "very liberal" (See Bernard v. Howell, supra) in the one instance, adopting an absolutist position in the other, and totally disregarding whether or not the civil cases raise any substantial questions. Certainly, the answer is not in the statutes. The criminal appeal statute, if anything, is not as broad as the civil appeal statute. See Philyaw v. State, 224 Ark.859, 277 S.W.2d 484(1955).

statutes couched in indistinguishable terminology. But the Court refused to stay its hand even in the fact of the following considerations:

(1) Respondents suffered no prejudice: Please note that respondents have never claimed that they sustained prejudice in this matter. And for good reason. Plainly this is not the type of case where the appellee can sustain any significant prejudice by reason of delay. We have seen cases where injured persons have recovered substantial judgments, where those same injuries have disabled the claimant from providing for himself and his family, where claimant is near destitution and where the defendant takes an appeal. In stockholder litigation, a corporation can be completely denuded while an appeal is pending. There are other cases where substantial delay (the 18 days reflected by this record would rarely classify as substantial) of an appeal is a tremendous burden on the opposing party but this is not one of them. This is a damage suit, pure and simple in which the defendants prevailed on a motion to quash. No affirmative relief was granted. In cases such as this, time is on the side of respondents. The longer it requires to move the case through court, the longer the petitioners will be denied compensation.

Even further, there can be no prejudice to respondents because there has been no delay in the overall. Under Arkansas law, the appellants may, as a matter of right, delay filing their notice of appeal until the very last day. White v. Avery, 226 Ark.951,299 S.W.2d 364(1956). Thereafter, he may as a

matter of right delay the filing of his transcript until the very last day. Wallis v. State, 245 Ark.29, 430 S.W.2d 860(1968)[10] In the present case, the order appealed from is dated November 15. Your petitioners had the unqualified right to wait until Monday, December 17 to give notice of appeal but they gave their notice on November 26. Had they delayed notice of appeal until December 17, they could then, as a matter of right and without any extension order, have filed the record with the Arkansas Supreme Court on March 18, 1974. The record was filed on March 14 (A-3). All briefing, hearing and disposition dates in the appellate court were hinged on March 14 (A-3). In the overall, the case was not delayed and respondents could not be prejudiced because petitioners acted within the overall time granted by law.

We would not have the temerity to argue that there is a constitutional right to tack unexpended days in the giving of the notice of appeal onto the days allowed for the filing of the transcript. We do most urgently submit that the Arkansas Supreme Court, being constitutionally obliged to exercise "sound discretion" had a duty to give consideration to this factor and that it refused to do so. While the Court overruled petitioners motion

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10. Appellee's remedy when facing a dilatory appeal is to order the record the record himself, and when available, even the day after notice of appeal, file it and request expedited treatment. Ark.Stats.Ann.,§§ 27-2128, 2141. Also, he may contest a trial court extension by immediate docketing under Id.s 27-2127.9. The appellate court may modify or dismiss, as circumstances indicate. Norfleet v. Norfleet, 223 Ark.751,268 S.W.2d387(1954).

for clarification of the dismissal order (A-6), its position in the light of past practice is plain. The Court has adopted a policy against considering extenuating circumstances even though it has been charged by the statute with the duty of doing so.

(2) There can be no doubt that petitioners' counsel acted in good faith: Petitioners' attorneys are naturally quite distressed. Not only have they sustained an economic loss to themselves, they have failed to secure the rights of their clients and have caused their clients an even greater loss. We make no bones about it. There are many instances where delay is purposely employed by counsel as a tactical weapon. Whenever such a situation appears, the courts, both trial and appellate, should deal with it without hesitation. Olympic Ins.Co. v. Harrison, supra; Philyaw v. State, supra. But, we ask, what in the world did petitioners or their attorneys have to gain by delaying the case? To the contrary, they gave absolute testimony to their good faith intent to expedite the case by giving an early notice of appeal. It was only when complications ensued that they asked for additional time. Again, counsel acted in absolute good faith in asking for and securing an extension order from the trial court judge. Does it make sense to consider that they would have risked the loss of everything had they suspected that the Trial Court's extension order would not be honored? Possibly there are those who might describe petitioners' attorneys as lazy, indolent, careless, ignorant or incompetent. We shall not pass judgment on ourselves except to say that no one can look at this record and say that petitioners or their

attorneys were guilty of intentionally and purposely delaying the case. Again, the Arkansas Supreme Court closed its eyes to this factor; the clear showing that counsel acted in good faith and that there was no purposeful delay of the case. In the exercise of "sound discretion," can a court completely disregard this factor?

(3) The Clerk contributed to petitioners' dilemma: As stated, p. 33, supra, it is always possible to argue that through greater diligence counsel might have avoided the trap. We have never experienced a personal injury or other tort case where the opposition would not find some basis to present the same argument. But the real point here is that we are discussing forfeitures and punishment, not negligence and proximate cause. The fact cannot be obscured that the Court's own personnel, working directly under its supervision, contributed to cause the dilemma for which petitioners are being punished. Due process prohibits the imposition of punishment through procedures that offend the sense of justice. The basic concept of due process is fair play. Both the end and the means must be fair and proper. U.S. v. Rispo, 460 F.2d 965(3-Pa.1972), U.S. v. Giglio, 405 U.S.150(1972). Where the Court is charged with the authority to exercise "sound discretion" and it imposes the ultimate penalty for failures to which its own personnel contributed, have the foregoing principles not been violated?

(4) Petitioners were misled by the trial court: We have already discussed Harris Truck Lines v. Cherry Meat Packers, discussing the perilous position into which a party is placed when the trial court grants an extension of time to act and the appellate court refuses to honor the extension. Again, the Arkansas Supreme Court has refused to consider this matter in the exercise of "sound discretion."

It is unthinkable that the circuit judge knowingly signed a void judgment. This competent and experienced trial court judge must have been of the opinion that he had the authority to grant the extension.[11] The net effect of the case is that the individual petitioners are being punished not only for the mistakes of their own attorneys, but for the mistakes of the Supreme Court clerk and the trial judge as well. Under the circumstances, does the exercise of "sound discretion" permit the dismissal of the case?

(5) The Court is punishing innocent people: Any relief granted by courts of law may be classified either as remedial or punitive. Where the moving party has sustained no injury, the relief by definition is punitive. In this case, respondents suffered no prejudice and the dismissal is wholly punitive. We can think of no justification for punishing Mr. Jim L. Napper or Mrs. Jo Ann Napper. They have done absolutely nothing that would merit punishment. Where there is no evidence of wrongful conduct, there is no Constitutional basis for the imposition of punishment. Thompson v. Louisville, 362 U.S. 199(1960), Holt v. Va., 381 U.S.131(1965), Vachon v. N.H., 414 U.S.478(1974). Even though the Court has admitted authority to exercise "sound discretion" and proceed to

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11. "Under Act 555 [of 1953] it was customary for attorneys to obtain extensions of time without notice to opposing parties and without specifying any particular reason for the extension." Gallman v. Carnes, supra.

the merits, it has dismissed and thereby punished innocent parties for acts and omissions over which they clearly had no control.

The harsh nature of dismissals and the fact that they necessarily punish wholly innocent persons has often been noted by the courts. Shaw v. Universal Life Ins.Co., 123 S.W.2d 738(Tex.Civ.App.1939), Arline v. Brown, supra, Flaksa v. Little River Const. Co., 389 F.2d 885(5-Fla.1968), Hassenflu v. Pyke, 491 F.2d 1049(5-Tex.1974), Stumpf v. Matthews, 195 F.2d 25(C.A.D.C.1951), Pond v. Braniff Airways, 453 F.2d 347(5-Tex.1972), Independent Prod. Corp. v. Loew's, Inc., 283 F.2d 730(2-N.Y.1960), Christoffel v. U.S., supra, Texas Const.Co. v. U.S., supra, Winter v. Crowley, supra, Bibeau v. N.E.Airlines, 429 F.2d 212(C.A.D.C.1970). In Bibeau, the Court stated that, while none of the circumstances by itself might require reversal, all of the factors taken together would preclude dismissal of the case. Petitioners would urge the same proposition.

THE DISMISSAL ORDER IN THIS CASE DEPRIVES CONSTITUTIONAL RIGHTS

Most of the federal cases discussed thus far concern the law as applied in the federal courts where the United States Supreme Court has supervisory jurisdiction. Even so, these rulings not only from the United States Supreme Court but from 11 different circuits composed of judges schooled in the law of 50 different states constitutes a profound judgment as to what is a fair and reasonable interpretation of the rules and statutes in question. And, procedural due process of law (employing the term in its broader context

which includes equal protection) under the Fourteenth Amendment primarily turns upon what is fair and reasonable.

> "* * * The Due Process Clause of the Fourteenth Amendment limits state action by norms of 'fundamental fairness' * * * derived not alone, * * * from the specifics of the Constitution, but also, as I believe, from concepts which are part of the Anglo-American legal heritage * * *." Sniadach v. Family Finance Corp.,395 U.S. 337,342(1969)(concurring opinion)

Procedures which are arbitrary, discriminatory or manifestly unfair offend the Constitution. Beyond this point, there is rarely a constitutional question for the states have wide latitude in the interpretation and application of their laws.

Access to the courts is fundamental to a scheme of ordered liberty for the alternative is fighting in the streets:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government." Chambers v. Baltimore & Ohio R.R.,207 U.S.142,148 (1907)(Dissent)

Emphasizing the basic nature of the right to sue and to be sued, this Court has long held that the Fourteenth Amendment forbids all unreasonable restraints upon the right of access to the courts. Gulf, C.& S.F.Ry. v. Ellis, 165 U.S.150(1897)(Statute singling out railroads as the only party against whom attorney fees may be awarded); Truax v. Corri-

gan, 257 U.S.312(1921)(Statute restricting injunctions by employers against employees).

On the other hand, it has been variously stated that there is no constitutional right to an appeal. (See, for instance, cases cited in Lindsey v. Normet, supra.) However, an examination of such authorities reflects that they have often been invoked in support of contentions far beyond their facts. Within the wide confines of the Fourteenth Amendment, states have the power to shape their own institutions, may create courts of various types, both trial and appellate, may define their jurisdiction and within the limits of "fundamental fairness" may grant access thereto, may place reasonable conditions upon the right of access thereto(the payment of reasonable fees being only one of those conditions) and in certain instances, may deny the right of access altogether.

It is granted that because of the peculiar attributes of particular types of litigation (for instance, small claims) the right of appeal may be restricted or denied. However, this does not go to prove that the right of access to the appellate courts is of a lower order than the right of access to the trial courts. The law deals with reality and reality says that neither the resources of the judiciary nor the litigants should be exhausted in the trial of smaller cases. For this reason, it is good sense and is not "fundamental unfairness" to terminate them at an early stage. No case that we can find holds that the right of access to the appellate courts is any the less valuable than the right of access to the trial courts.

Whether or not a state has the right to abolish appellate courts altogether is academic for every state in our union, and virtually every civilized nation as well, has established a system of appellate courts and provides broad rights of recourse thereto. The following statement with reference to the right of trial by jury is equally applicable to the right of appeal: "[These] guarantees * * * reflect a profound judgment about the way in which law should be enforced and justice administered." Duncan v. La., 391 U.S.145,155(1968). Petitioners' right to take an appeal in this is guaranteed by the Constitution of Arkansas, Art.7,§4, Hoxie v. Gibson, 155 Ark.338,245 S.W.332(1922). The people of Arkansas having incorporated the right of appeal into their system of laws, the Fourteenth Amendment guarantees that appeals may not be dismissed and the appellant's rights declared forfeit on grounds which fail to meet Fourteenth Amendment standards of "fundamental fairness."

The Griffin line of cases thoroughly established this proposition with respect to criminal appeals.

> "Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings, the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. * * *
>
> "All of the States now provide some method of appeal from criminal convictions, rec-

> ognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside. * * *" Griffin v. Ill., 351 U.S.12,18-19(1956)(per Black,J.)

Mr. Justice Black urged that the right of appeal was equally important to civil justice in Meltzer v. LeCraw, 402 U.S.954(1971)(Dissent from denial of review). In Lee v. Habib, 424 F.2d 891(C.A.D.C.1970), it was held that the right of appeal was also essential to civil justice. "The concept of equal protection is equally viable in appellate courts." (p.899). See also, In re Brown, 439 F.2d 47 (3-V.I.1971)(Justice to juvenile offenders includes the right of appeal), and Dorrough v. Estelle, 497 F.2d 1007(5-Tex.1974)(Escape statute which forfeits right of appeal only for certain offenders violates equal protection), each emphasizing the essential nature of the right of appeal and holding that it may not be denied on irrational grounds. Stating that "the availability of appellate review for correction of errors has become critical to the application of preclusion doctrine," the American Law Institute has decided that a judgment which could not, as a matter of law, have been appealed, may not be applied in a later case as an estoppel. Res.Jmts.2d, T.D.(1973)§68.1. This Court expressly applied the Griffin line of decisions to the right of appeal in Lindsey v. Normet, discussed infra.

Petitioners urge that the dismissal order of the Arkansas Supreme Court was arbitrary and unreasoned. This Court has considered the Constitutional implications of dismissals in several instances, finding a deprivation here and no deprivation there, but cutting a fairly straight path in all.

In Hovey v. Elliott, 167 U.S.409(1897), the defendant's answer had been stricken and default entered for failure to comply with an order requiring the fund being litigated to be deposited with the court. This, the Court held was not a permissible punishment for contempt, due process had been denied.

In Hammond Packing Co. v. Ark., 212 U.S. 322(1909), the defendant refused to comply with an order to produce records, its answer was stricken and a default entered. Judgment upheld; the Court distinguished Hovey on the basis that defendant there had been denied his right to defend "as a mere punishment," Id.350, while in Hammond, the Court construed the failure to produce documents as raising an inference that the evidence contained therein would negate the defendant's answer. Under such circumstances, the opponent was prejudiced by the failure to produce. Petitioners urge that the present dismissal serves no valid interest of the respondents nor was it necessary to preserve the time and convenience of the court. Lacking remedial effect, it was "mere punishment" proscribed in Hovey.

Hovey was again distinguished in National Union v. Arnold, 348 U.S. 37(1954)(Defendant, appealing from large libel judgment without supersedeas, refused to turn over to receiver,

U. S. bonds kept in another state, its only significant asset.). Dismissal of the appeal after the defendant had been given repeated opportunities to comply was again upheld on grounds that the action was necessary to safeguard the opposing party from prejudice.

It is to be emphasized that each of the foregoing cases, Hovey, Hammond and Arnold, all involve cases of deliberate refusal to comply with court orders. Petitioners failure to comply with the requirements of the Arkansas Supreme Court was at most an honest mistake, the type of mistake we feel that any busy lawyer can make. Certainly, no lesser standard of due process can be applied in cases of mistake. Hovey has not been overruled. Rather than overrule, Hammond and Arnold have strengthened the premise of Hovey that a man's case may not be dismissed as a purely punitive measure. Unless there is a remedial element to be found in the order of the Arkansas Supreme Court, unless it was entered as a safeguard against "prejudice," it cannot stand.

We think that Link v. Wabash R.Co., 370 U.S.66(1962)(Case dismissed for long series of delays concluded by failure to attend pretrial conference) is clearly distinguishable upon its facts from the case inhand:

> "* * *It could reasonably be inferred from * * *[the absence of petitioner's counsel], as well as from the drawn-out history of the litigation * * * that petitioner had been deliberately proceeding in dilatory fashion.

* * * * * * * * *

"We need not decide whether unexplained absence from a pre-trial conference would alone justify a dismissal * * * the Distract Court in this case relied on all the circumstances * * * including the earlier delays."

The record in bar is bereft of any indication of deliberate dilatory action. There is no indication of a long series of delays. We entertain doubts whether Link presented "substantial questions" and distinguish on these grounds, for Link had been previously dismissed on the pleadings, but reversed for trial. Id.628,fn.2. See discussion of Pyramid Motor Freight v. Ispass, supra. Nor does Link go to establish that dismissals may be Constitutionally entered for punitive purposes. The long delay (over three years after the mandate on reversal had been returned) raises at least some presumption of damage to the opposing party. Moreover, we think it plain that the real prejudice in Link was to the Court itself, setting and resetting the case, handling and re-handling the file. The judge had set aside a particular time to consider this case and when counsel was absent, the Court's time was lost.

The eighteen day delay (versus three years delay) in the present case occasioned no inconvenience to the court whatever. No proceedings had been scheduled whatever until the transcript was received and docketed by the Arkansas Supreme Court and the briefing schedule (A-3) was met (A-4). Petitioners were at all times ready and willing to go forward. However, instead of assigning the

case for argument at the June 10th call, the Court on April 29th dismissed and forfeited the appeal (A-4).[12]

We think the punishment versus prejudice distinction is fully illustrated by Lindsey v. Normet, 405 U.S.56(1971). The Oregon FED statute was upheld insofar as it required trial within six days of service and limited the issues to the question of default. These provisions serve a valid purpose and are related to the special character of the landlord-tenant relation; every day of delay in recovering his premises is extremely prejudicial to a landlord. On the other hand, the requirement that a tenant give double

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If the Court has doubt as to Link's application, we ask the re-examination of this minority (4-3) decision. Mr. Justice Black urged that the plaintiff's cause of action, a "valuable property * * * is entitled to the protection of the Constitution" and could not be taken away without notice and hearing. Id.646. Professor Wright states:

> "This seems a very harsh sanction to impose on the plaintiff for the delinquency of his counsel. A fine against the attorney, and a resetting of the conference would appear more appropriate * * *". Wright, Fed.Cts.Hornbook, 2d ed.400.

Link has also been criticized in the law reviews. Comment-Demise(Hopefully) of an Abuse; Dismissal, 7 Cal.West.L.Rev.438(1971), Notes: Civil Procedure - Power to Discipline Attorneys for Delay, 38 Notre D. Lwyr.158(1963), Current Decisions: Procedure-Failure to Appear, 35 U.Colo.L.Rev.455(1963), Wolf, Attorney's Negligent Failure to Comply With Deadlines, 47 Tex.L. Rev.1198(1969). A careful re-examination of this decision is in order.

bond in order to appeal was struck down as going beyond remedial functions and having a clear punitive effect.

> "Similar conditions on the tenant's right to appeal * * * [conditioned on securing the landlord against the loss of accruing rent] would also raise no serious constitutional questions, * * *. Section 105.160, however, imposes additional requirements that in our judgment bear no reasonable relationship to any valid state objective and that arbitrarily discriminate against tenants appealing from adverse decisions in FED actions.
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> "* * * When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. * * *" Id.76-77.
>
> "The double-bond requirement heavily burdens the statutory right of an FED defendant to appeal. While a State may properly take steps to insure that an appellant posts adequate security * * *, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued * * *. The claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive for it not only bars non-frivolous appeals by those who are unable to post the bond but it also allows meritless appeals by those who can afford the bond. * * * We discern nothing * * * in the special characteristics of the landlord-tenant relationship to warrant this discrimination." Id.76-78.

The Arkansas procedure makes no attempt to screen out non-frivolous appeals; the good go out with the bad. Pyramid says that a court in weighing dismissal can (and should) take an advance peek at the merits of the case and be guided accordingly. Even though it operates under a counterpart of the federal rules, the Arkansas Supreme Court has resolutely ruled otherwise.[13]

There is no conflict between Arnold and Hammond on the one hand and Lindsey on the other. In Arnold and Hammond, the restrictions on access to the courts were found to be needed in order to protect the opposing party from prejudice; their effect was remedial. In Lindsey, the double-bond was not for the purpose of securing the opponent in the payment of his damages; its effect was punitive. It therefore, offended the Fourteenth Amendment. Concerning the dismissal in hand, the Supreme Court of Arkansas has dismissed without inquiry as to prejudice. The statute plainly says that failure

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13. While we emphasize the importance of the right of appeal and urge that it must be free of unreasoned restrictions, we recognize not only the right but the necessity to place reasonable restrictions thereon. But, this is equally as true at the trial level as the appellate. The doctrine of free access to the courts is not offended by reasonable restrictions at either level. Cohen v. Beneficial Loan Corp., 337 U.S.541(1949)(Upholding state statute requiring "splinter interests" stockholders to give security for corporation's expenses in derivitive suits). The punishment versus prejudice distinction is applicable to Cohen.

to take any further steps beyond the notice of appeal "shall not affect the validity of the appeal * * * but shall be ground only for such action as the appellate court deems appropriate * * * which may include [but by no means requires] dismissal * * *." p.8, supra. By this statute, the court was charged not to proceed arbitrarily, but with discretion. This, it refuses to do.

THE REFUSAL TO EXERCISE SOUND DISCRETION OFFENDS THE FOURTEENTH AMENDMENT

The case in bar reflects that the Arkansas Supreme Court has forfeited the appeal for an 18 day delay in a case where petitioners' counsel in good faith secured an extension order from the trial court and the clerk furnished counsel with an out-of-date rules pamphlet. The case was dismissed even though it had been described by a federal judge as "very serious" and the opposition was not prejudiced. The reason for the action is that the Court has a policy against tolerating a single day's delay except for "great unavoidable casualty that prevented either the filing of the record within time or timely * * * extension," West v. Smith, supra, at 130. Strangely, when Arkansas adopted this statute, the United States Supreme Court had already construed its parent as requiring the appellate court to exercise "sound discretion." Has not the Honorable Court below closed its eyes to the plain language of the statute and the decisions which had been incorporated therein. Has not the Honorable Court below imposed requirements that, in the words of Lindsey, "bear no reasonable relationship

to any valid State objective and that arbitrarily discriminate against persons appealing from adverse decisions * * *." Id.76-77.

The case in bar is not unlike the early case of Yick Wo v. Hopkins, 118 U.S.356(1886), where an ordinance prohibited laundries from being operated in frame buildings "without having first obtained the consent of the board of supervisors." This Court conceded that the interpretation of state statutes is primarily a matter of state law, "our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the Constitution, * * *". The ordinance was found unconstitutional as interpreted and as applied:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered * * * so as practically to make unjust and illegal discriminations between persons in similar circumstances, the denial of equal justice is still within the prohibition of the Constitution." Id.373-74.

To similar effect, see La. v. U.S., 380 U.S.145(1965), holding a voter's literacy test to be unconstitutional in its application.

By what objective standard does the Honorable Court below consider itself to be guided? Has it not replaced the standard of sound discretion with an arbitrary standard of no discretion? Where a court is expressly invested with discretion, is it not also charged with the duty to exercise that discretion?

"Discretion, to be worthy of the name, is not unchanneled judgment; it is judgment guided by reason and kept within bounds, otherwise, ...it is 'the law of tyrants:'" McGautha v. Cal., 402 U.S. 183(1971)(Dissent).

It is submitted that the Arkansas Supreme Court has lost sight of the following principles thereby depriving petitioners of the right of access to the courts, guaranteed by the Due Process and Equal Protection Clauses:

"The proper disciplining of a party under circumstances of default is one of those necessary, but troublesome questions which usually must be left to the control of the * * * [court involved]. Reluctant as we are to interfere, we feel that this is an occasion where, * * * the penalty assessed is drastic and the case must be returned to accord defendants a trial of the seriously contested issues of fact involved. In final analysis, a court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a serious showing of wilful default." Gill v. Stolow, 240 F.2d 669(2-N.Y.1957).

THE ARKANSAS DISMISSAL POLICY HEAVILY BURDENS THE ECONOMICALLY DISADVANTAGED LITIGANT

"There can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." Griffin v. Ill., Id. at 19.

Petitioners do not claim to be indigent. This is not an indigent rights case as such. However, it is typical of the unequal economic position of the respective litigants and their counsel experienced daily in the courts of our land. And, bear in mind that poverty is a relative matter. We are fortunate that those, who according to the standards of this country are in abject poverty, receive more of the necessities of life, and amenities as well, than those in average circumstances living in the lesser developed countries of Africa and Asia.

Just as the present case is not an indigent rights case, close analysis will show that, strictly speaking, neither was Lindsey. While the poverty of those plaintiffs served to illustrate the oppressiveness of the double-bond provision, plaintiff's poverty was not a deciding factor. The decision would have been the same if Nelson Rockefeller had been the plaintiff. Relief was not granted to the poor, it was granted to everyone. This Court made no requirement that anyone show his inability to post a double-bond. The statute was held to bear "no reasonable relationship to any valid state objective" and was stricken in toto. Nelson Rockefeller had now been excused from posting a double bond. We emphasize this point because it discloses the real grounds upon which Lindsey was decided. Regardless of the ability to pay, the statute placed a punitive burden upon the right of appeal. This, the Fourteenth Amendment will not contenance.

We do not gainsay that the double-bond did not place a particularly heavy burden on the economically disadvantaged. But, by the

same measure, the harsh and punitive procedures employed by the Supreme Court of Arkansas place a particularly heavy burden upon the economically disadvantaged.

It was held in Adkins v. Dupont Co., 335 U.S.331(1948), that a poor man need not hire a poor attorney in order to proceed in forma pauperis. However, the facts of life are that he does. The economic gulf between the plaintiff's lawyer and the defendant's lawyer is usually as great or greater than the economic difference between the plaintiff and the defendant (the insurance carrier often being the real defendant).

Mr. Chief Justice Burger recently estimated that from one-third to one-half of the lawyers who appear in serious cases are not qualified to render adequate representation to their clients. Burger, The Special Skills of Advocacy, 42 Fordham L.Rev.227,234(1973).

We have cited a number of dismissal cases in this petition. Lay aside for the moment those which involve deliberate refusals to comply with the appointed procedures, e.g. Hovey, Arnold. The remainder involve oversight, inexperience or inefficiency on the part of lawyers. And, please take careful notice. The vast bulk of these cases reflect that it was the lawyer on the "poor side" rather than the lawyer on the "paying side" of the case who slipped up. We ask: Did the Honorable Chief Justice not notice on which side of the docket is the less qualified lawyer perenially to be found? And we further ask: Who usually is forced to take the loss when a case is dismissed on account of a fluke, those who can afford

the loss, or those who cannot?

> "In our proper concern for criminal justice, we must not forget that the rights and interests of civil litigants should not be brushed under the rug. * * * The injustice in some civil cases becomes part of 'the short and simple annals of the poor.' In some of those cases the human tragedy was very real to the principals." Id.238.

The case in bar is fairly typical. Respondents, as we believe, are fortunate enough to be protected by the Continental Casualty Company, the largest writer of professional liability insurance in America (D.181-82). They have chosen to protect their interest, as they had a right to do, a large highly rated law firm with impeccable references. 1 Martindale-Hubbell Law Directory: 1974 Ed.159,163. Petitioners, on the other hand, had neither the economic resources nor the expertise to pick and choose. When the poor man goes to court (and we use the term "poor" in the most expansive sense, referring to the bottom 95% of the economic barrel), he is lucky to find a lawyer, any lawyer who is willing to take the case for little or nothing in hand and gamble his compensation on the outcome of the case. Petitioners were forced to accept lawyers in smaller firms with a lesser rating, Id. at 158, or no rating at all,4Id.at 500.

The Honorable Chief Justice suggests that specialization might alleviate the problem of inadequacy of counsel. As far as large law firms are concerned, specialization has

already gone far, for it is almost the invariable rule that different members of the firm will concentrate in diverse areas. Those of economic power and affluence have long enjoyed the benefits of specialization for they are almost the exclusive clients of the large firms.

But, who, we ask, will ever specialize in plaintiff's appeals? A plaintiff's lawyer may prosecute an appeal for experience, to build a reputation, out of loyalty to his client or because his sense of justice demands it, but unless the stakes be very high, the prospect of a worthwhile fee is small indeed. Far more appeals are lost than there are won, in which case there will be no compensation. And, what does the plaintiff's lawyer profit for his pocketbook on winning an appeal? Usually, it is nothing; instead he receives a reversal order--a mere piece of paper entitling him to go back and plead the case before the same trial court that, like as not, exhibited little sympathy for the cause in the first place (cf. Link v. Wabash Ry., supra) or the appeal would never have been necessary. There, he must again gamble for his client and for his fee. Unless and until there is government subsidy (to which we are personally opposed), the practical prospects are that the general public must take their representation from the general practitioner in the office down the street and, if an appeal is required, no one else will be available to prosecute it. Regardless of his expertise in the handling of appeals, Mr. General Public is stuck with Mr. General Practitioner, for richer or for poorer, for better or for worse.

If the Court will review the cases cited from Pyramid on, the whole lot, or run its own survey, it will be obvious that in cases of dismissal or motion to dismiss based upon the inefficiency of counsel, it was almost always the lawyer for the economically disadvantaged who slipped up. If dismissed, that lawyer is likely to go unpaid, but that is not the real tragedy. The lawyer will have a number of cases, the client will ordinarily have only one. Those who can afford to lose the least will lose the most. As is all too often the picture of justice in America, the length of a man's pocketbook can and often does determine the type of justice he gets.

We hasten to assure opposing counsel that our remarks were not intended to offend any more than petitioners' counsel intend to demean themselves. We only point out the economic facts of life existing in the courthouse. Except possibly with respect to their strategy not to promptly challenge the extension, see fn.7, pp.23-24, opposing counsel have been gentlemen. We do not blame them for claiming a forfeiture; under the adversary system, they could do no less. We blame the law for allowing a forfeiture and urge that the burden of these archaic procedures weighs most heavily on the economically disadvantaged.

Of course, judges, like all human beings, become impatient when lawyers fail to perform punctiliously. However, bear in mind that the life of a trial lawyer is an unending series of deadlines. Typically, he will have from 25 to 50 active files. Behind each of them will be an anxious client pressing for action on his case. On each of these cases,

there will be trial settings, pleading dates, answer dates, motion dates, deposition dates, discovery dates, etc. In an urban area, counsel will have matters pending in a number of courts and some of the judges will be more than a bit parochial about the matters pending in their court. Back at the office, the attorney must keep track of appointments with clients and witnesses, watch the due date on his note at the bank and remember his wife's birthday. Is it small wonder that various deadlines from time to time will go by unnoticed?

Without doubt, appreciation of these considerations was the entire reason behind the adoption by the Arkansas Legislature of appellate procedure patterned after the federal rules. It was not for the purpose of delaying and dragging appeals out forever. As a matter of fact, the time for prosecuting an appeal was reduced by five months (See §27-2106, Ark.Stats.Ann.1947 ed.(Orig.Vol.)), and modern appellate practice might indicate further reduction. However, lengthening or shortening the time required will not solve the problem of oversight for error is endemic to the human race. The purpose of the revision was to get away from an overly rigid system of appellate practice and to institute a system which provided for some play at the joints.

How the Honorable Supreme Court of Arkansas failed to understand and appreciate this, how they continue to refuse to exercise the authority delegated to them, we cannot fully understand. Of one thing we can be sure. The Court's unvarying practice of dismissing

all appeals for the slightest delay, refusing to consider the exigencies of the case, when they have ample authority to do so, is equally as arbitrary as the double-bond in Lindsey, bears no more reasonable relationship to any valid state objective and discriminates against the poor just as much as Lindsey's double-bond.

THE COURT REFUSED TO CONSIDER AVAILABLE ALTERNATIVES

If this dismissal was designed to "teach a lesson" to anyone, it is an expensive lesson--a $75,000 lesson. And the people who will pay for this lesson are Mr. and Mrs. Napper, the individual petitioners, who may never have another occasion to go to court during their lifetimes. If the procedure is designed to "teach a lesson" to the bar in general, it appears that it is extremely slow in learning for it appears that one or more cases per month have been going down the drain for the past 20 years. We know nothing of the others, but a number of them must have been meritorious and the total hardship and economic loss must be staggering.

Messrs. Gilbert and Sullivan have musically inveighed: let the crime fit the punishment, let the punishment fit the crime. Has the Honorable Court below not overlooked this rather basic premise? It has long been established as a Constitutional proposition that confiscatory rate schedules established by state regulatory agencies violate due process. Is not the present ruling of the Supreme Court of Arkansas equally confiscatory?

The Court below has the power to award or deny costs. Is it not possible that the Court could secure compliance with the deadline to file the record by refusing to allow costs when a record is marginally late? Would an order providing that the case will be dismissed unless a late fee of $50 or $100 is paid into the court's library fund not be as effective as all those dismissals? There is also the possibility of allowing damages to the opposing party, if they can show damage.

For the more serious cases, contempt and grievance proceedings against the attorneys can be invoked. Christoffel v. U.S., supra; Bibeau v. N.E.Airlines, supra; In re Niblack, 476 F.2d 930(C.A.D.C.1973). Also, there is precedent under Rule 46(c), Fed.R.App.Proc., for the entry of fines and reprimands against attorneys who fail to properly prosecute an appeal. U.S. v. Pearson, 476 F.2d 996(9-Cal.1973); U.S. v. Carrion, 475 F.2d 770(9-Cal.1973); In re Winsberg, 446 F.2d 641(9-Cal.1972); Mathern v. U.S., 391 F.2d 449(5-La.1968). While the reported decisions all involve delay in criminal cases, there is nothing in the rule limiting its application to criminal cases and we know of no considerations that would require such limitation. Could the Arkansas Supreme Court not adopt a similar rule?

Neither petitioners nor their counsel nor the United States Supreme Court is authorized to prescribe procedures to be followed in the Supreme Court of Arkansas. However, the fact that all of these reasonable alternatives are available, coupled with the fact that

the Arkansas Court has declined to consider them in any reported case, or in any unreported case of which we are aware, heightens the "arbitrary and irrational" nature of this dismissal. Lindsey v. Normet, supra, at 79. Petitioners urged in their petition for rehearing below that "alternative measures, less harsh and less onerous are available" (A-5) and in their brief stated:

> "This dismissal order is even more harsh and arbitrary because the parties themselves, Mr. and Mrs. Napper are paying the extreme penalty even though they are wholly innocent. This Court erred in dismissing without first considering other means to secure timely and prompt proceedings such as delay penalties, reinstatement fees, attorney's fees to one's opponent, the denial of costs on appeal to a dilatory party, etc. Act 38 of 1973 gives the Court authority to forbid costs to a dilatory party regardless of outcome, a punishment which would more appropriately 'fit the crime.' Dismissal, which punishes the parties themselves, may only be resorted to (1) for gross misconduct or (2) because the opposing party has been prejudiced by the offender's conduct."

In Societe Internationale v. Brownell, 357 U.S.197(1958), a dismissal order entered against a Swiss bank for failure to comply with a discovery order was reversed, the plaintiff bank being unable to comply because of Swiss criminal laws forbidding the disclosure sought by the government. The Court considered Hovey and Hammond and decided that it would raise "substantial constitutional

questions" to dismiss for non-compliance with the Rules where the party had made a good faith effort to comply. Held: We will construe the Rule so as to avoid constitutional questions, if the failure to comply is because of inability to do so, rather than because of wilfulness, bad faith or any fault of the party, the action may not be dismissed and less drastic sanctions must be invoked.

> "The findings below * * * compel the conclusion * * * that petitioner's failure * * * was due to inability fostered neither by its own conduct nor by circumstances within its control * * *.
>
> "We think that Rule 37 should not be construed to authorize dismissal because of petitioner's non-compliance * * * when it has been established that failure to comply has been due to inability, and not to wilfullness, bad faith, or any fault of petitioner." Id.211-12.

Your individual petitioners, Jim Napper and Mrs. JoAnn Napper, the individual plaintiffs, are just as helpless in this matter as the Societe Internationale. They hired the best lawyers they could find for what they could afford to pay and turned the case into their hands. They did not know until it was too late and could not have known that their case was about to be dismissed. On authority of Societe Internationale, petitioners submit that the Fourteenth Amendment will not allow dismissal, not at least until the State Court has considered the availability and appropriateness of lesser sanctions and has found them insufficient.

Respondents will doubtless raise the agency argument presented in the Link case. We urge consideration and adoption of Mr. Justice Black's dissent.

The law of agency has a definite and well recognized limitation, as applicable to the relationship of attorney with court and counsel as it is in any other field of law. The principal may be held for the damage caused by the agent acting within his authority, but the principal may not be punished for the agent's conduct unless he participates or solicits that misconduct.

If I am in a collision with a delivery truck making its appointed rounds, I may sue the employer for my damages. However, the employer unless he directly induced the misconduct, may neither be fined nor imprisoned because the driver was intoxicated. By the same measure, I might recover punitive damages from the driver, but I may recover only my actual damages from the employer.

With minor modifications, this basic principle of agency law is equally applicable when an attorney acts on behalf of a client. Where the lawyer acting within his scope of authority makes representations, statements or agreements, his client is bound. Where the lawyer acts improperly or fails to act as he should, the client must suffer when the opposing party or the Court suffers substantial prejudice (damage). However, the relief granted in this case is strictly punitive. Neither the Due Process Clause nor the Equal Protection Clause will allow the court to resort to punitive measures against a wholly innocent party. Societe Interna-

tionale v. Brownell, supra; Flaksa v. Little River Const.Co.,supra; Richman v. Gen.Motors, 437 F.2d 196(I-Mass.1971); Industrial Bldg. Materials v. Interchemical, 437 F.2d 1336(9-Cal.1971).

> "'Due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, * * *, [i]t is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
>
> "* * * The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doint it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished--these are some of the considerations that must enter into the judicial judgment." Joint Anti-Fascist Comm. v. McGrath, 341 U.S.123,162-163(1951) (concurring opinion).

The proposition that we would urge under our second question goes no further than this: Before dismissing this case and depriving innocent persons of their valuable property, the Supreme Court of Arkansas had the duty to give fair consideration to reasonable alternatives; all of which it failed to do. Obviously, the decision of the Court

below fails to fulfill Mr. Justice Frankfurter's measure for due process and for such reason, the petition must be granted.

PRAYER

For the reasons given, your petitioners ask that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Of counsel:

Charles Ben Howell
Dallas, Texas

September 30, 1974

APPENDIX

PROCEEDINGS IN THE U.S. DISTRICT COURT

NO. LR--71-C-124 JIM L. NAPPER & WIFE, PLAINTIFFS V. ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ETC.,DEFENDANTS, U.S. DISTRICT COURT, E.D.ARK.W.D.

ORDER [REMANDING CASE]
(Filed May 10, 1973;C.14)

PROCEEDINGS IN THE STATE COURT

NO. 76409 JIM L NAPPER & WIFE, PLAINTIFFS V. ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ETC. DEFENDANTS, CIRCUIT COURT OF PULASKI COUNTY, ARK.

ORDER [QUASHING SERVICE]
(Dated November 15, 1973;C.53-54)

Now on this day comes on for consideration by the Court the motion of the defendants to quash purported service of summons upon them and the defendants appear through their attorneys, Wright, Lindsey & Jennings, by Alston Jennings, and the plaintiffs appear by their attorney, James R. Howard, and the Court upon consideration of defendants' motion, plaintiffs' response thereto, lengthy briefs submitted by both parties in support of their positions, affidavits of William Pritchard and Jim L. Napper, other pleadings and papers in the file, statements and argument of counsel, and other matters and proof, finds:

1. Plaintiffs' original complaint was filed in this court on June 9, 1971, and service was thereafter attempted on the defendants (who, at all times pertinent hereto, have been residents and citizens of the State of Texas) in Texas by virtue of Ark. Stats.Ann.§§27-2501 - 27-2507 (the Uniform Interstate and International Procedure Act).

2. On petition of the defendants filed July 12, 1971, the case was removed to the United States District Court for the Eastern District of Arkansas, Western Division, and by order dated May 9, 1973, it was remanded by that court back to this court for failure of diversity jurisdiction, plaintiffs having been found to be citizens of the State of Texas. By order dated May 11, 1973, all original papers and pleadings filed in the United States District Court were returned to the Clerk of this court and made a part of the file in this case.

3. There has been no relationship of the defendants, either individually or as a partnership, with the State of Arkansas that would subject them to the exercise of personal jurisdiction over them by this court. Nor have defendants, individually or as a partnership, engaged in conduct that would form the basis for the exercise of personal jurisdiction over them by this court under Ark.Stats.Ann., § 27-2502.

IT IS, THEREFORE, BY THE COURT, CONSIDERED, ORDERED AND ADJUDGED:

The purported service of summons upon defendants is invalid and is, therefore, quashed, and the defendants are discharged forthwith with their costs.

. . . . . .

[PLAINTIFFS'] NOTICE OF APPEAL
(Caption as immediately foregoing;
filed November 26, 1973;C.56)

Notice is hereby given that the Plaintiffs appeal from the order of this Court made on November 15, 1973, which order quashed the Service of Summons upon the Defendants and held that the Defendant herein is not amenable to service under § 27-2501 et seq. Ark.Stat.Anno.(1962 Repl).

. . . . . .

EXTENSION
ORDER
(Caption as immediately foregoing;
dated Tuesday, February 5, 1974; C.57)

On motion of the Plaintiffs the time for lodging the transcript in this case in the Supreme Court is hereby extended to March 29, 1974.

PROCEEDINGS IN THE SUPREME COURT OF ARKANSAS

NO. 74-77 JIM L. NAPPER, ET UX, APPELLANTS V. L.W. ANDERSON, ET AL, APPELLEES, SUPREME COURT, ARK.

VOL I [OF TRANSCRIPT]
(Endorsed by Clerk of Supreme Court as follows, see front cover:)

Transcript filed
March 14, 1974
Jimmy H. Hawkins, Clk.
by Dona L. Williams, C.D.C.
APPELLANTS BRIEF DUE 4-23--74
APPELLEES BRIEF DUE 5-23-74
REPLY BRIEF DUE 6-7-74
SUBJECT TO CALL 6-10-74

. . . . . .

VOL II [OF TRANSCRIPT]
(Caption as immediately foregoing;
filed March 14, 1974;)
(Cover endorsed by Clerk of Supreme Court in identical manner as Volume I on front cover.)

. . . . . .

[APPELLEES'] MOTION [TO DISMISS]
(Caption as immediately foregoing;
filed March 25, 1974; M.Dis.1-4)

. . . . . .

ANSWER TO APPELLEE'S MOTION TO DISMISS/MOTION FOR ORDER TO AMEND THE TRANSCRIPT/ALTERNATIVE SUGGESTION OF PREMATURE APPEAL
(Caption as immediately foregoing;
filed April 3, 1974;Apt.Ans.1-29)

. . . . . .

[APPELLEES'] RESPONSE
(Caption as immediately foregoing;
filed April 12,1974; Ape.Res.1-3)

. . . . . .

ABSTRACT AND BRIEF FOR APPELLANTS
(Caption as immediately foregoing;
filed April 24,1974; A&B 1-139)

(NOTE: Appellants were granted a "printer's extension of one day in accordance with local practice)

. . . . . .

[DISMISSAL] ORDER
(Caption as immediately foregoing;
dated April 29, 1974)

Appellee's motion to dismiss appeal is granted.

. . . . . .

[APPELLANTS'] PETITION FOR REHEARING
(Caption as immediately foregoing;
filed May 15, 1974; Pet.Reh.1-2)

APPELLANTS hereby PETITION FOR REHEARING and

request that dismissal be set aside upon grounds that the same is contrary to Ark.Const.Art. 2, §§ 3 & 8 and U.S.Const. Amdt.14, § 1 in the following respects: (1) Neither the facts nor appellees' motion indicates any prejudice to them and the Court has made no inquiry. The dismissal is therefore a fine, penalty or forfeiture rather than a remedial action. (2) Appellees cannot have suffered prejudice because under the clear decisions of this Court, appellants had a right by deferring the notice of appeal to withhold the record beyond the date upon which it was actually filed. (3) The Court's own officer contributed to appellants' failure to timely proceed by furnishing to counsel out of date information upon which counsel was likely to rely and did in fact rely thereby setting a trap for the unwary. (4) The individual appellants, Mr. and Mrs. Napper, are wholly blameless and their attorneys obviously believed in good faith that a valid extension had been granted. The dismissal necessarily constitutes a fine levied upon innocent persons for the incompetence or inexperience of their attorneys. (5) Alternative measures, less harsh and less onerous are available to enforce compliance with the rules and statutes of appellate practice but the Court failed to consider them.

Because of the foregoing factors, the dismissal deprives Constitutional rights of Due Process and Equal Protection. Wherefore, appellants ask that the same be set aside.

(NOTE: Appellants' Brief appended thereto is omitted)

. . . . . .

ORDER [DENYING REHEARING]
(Caption as immediately foregoing;
dated June 3, 1974)

Appellant's petition for rehearing is denied.

. . . . . .

ORDER
(Caption as immediately foregoing;
dated June 3, 1974)

Appellant's motion for clarification of dismissal order and to recall dismissal order is denied.

OPINIONS IN RELATED CASES

(See following page)

NAPPER v. JOHNSON
Cite as 464 S.W.2d 696

Jim L. NAPPER and Wife Jo Ann Napper, Appellants,

v.

Earl B. JOHNSON, Appellee.

No. 4974.

Court of Civil Appeals of Texas, Waco.

Feb. 4, 1971.

Rehearings Denied March 4, 1971.

Action to cancel instrument in form of deed. The 160th District Court, Dallas County, Hoyet A. Armstrong, J., rendered judgment for defendant, and plaintiffs appealed. The Court of Civil Appeals, McDonald, C. J., held that finding that grantee did not know or should not have known that grantors intended instrument to operate as mortgage was against great weight and preponderance of evidence.

Reversed and remanded.

1. Evidence ⇐265(10)

Litigant's direct unqualified testimony regarding his personal knowledge is binding on him.

2. Partnership ⇐150

One partner's knowledge, or what he should have known, is binding on other partner.

3. Mortgages ⇐38(5)

Retention of possession by grantor is circumstance indicating mortgage rather than sale.

4. Mortgages ⇐38(1)

Disparity between value of property and sale price is circumstantial evidence that grantee should have known that transaction was intended as mortgage.

5. Mortgages ⇐38(1)

Finding that grantee did not know or should not have known that grantors intended instrument to operate as mortgage was against great weight and preponderance of evidence.

Charles Ben Howell, Dallas, for appellants.

Anderson, Henley, Shields, Bradford & Pritchard, W. A. Pritchard, Dallas, DeLange, Hudspeth, Pitman & Katz, Eugene J. Pitman, Houston, for appellee.

OPINION

McDONALD, Chief Justice.

This is an appeal by plaintiffs Napper and wife from a take nothing judgment, in a suit to cancel an instrument in the form of a deed, which plaintiffs executed to defendant Johnson on their home. Plaintiffs assert the instrument was intended to operate as a mortgage.

Plaintiffs sued defendant alleging they owned their home in Dallas; that they requested a $15,000. loan from defendant; that defendant to mask the real effect of the transaction required plaintiffs to sign a deed to their property; that the deed is void because in truth and in fact it was an intended mortgage. Plaintiffs prayed for cancellation of the deed and that defendant be mandatorily enjoined to convey and return to plaintiffs their property.

Trial was to a jury which found:

1) Plaintiffs Napper and wife intended the instrument they signed to operate as a mortgage on the property, to secure the

amount disbursed by defendant Johnson at the time, rather than an absolute conveyance of such property.

2) Defendant neither knew nor should have known that plaintiffs Napper intended the instrument to operate as a mortgage on the property in question.

The trial court rendered judgment on such verdict that plaintiffs take nothing.

Plaintiffs appeal on 15 points contending among other things, the jury's answer to Issue 2 is so against the great weight and preponderance of the evidence as to be manifestly unjust.

Plaintiffs Napper and wife bought the property here involved on February 11, 1966 from W. D. Sims and wife. It was their homestead. The purchase price was $14,950; and the Nappers executed a deed of trust and vendor's lien note for the amount not paid in cash.

During 1966 plaintiffs moved to Arkansas, and rented their home in Dallas. On January 29, 1969 plaintiffs were in arrears on the note to the Sims, and Sims caused the property to be posted for foreclosure. Plaintiff sought the services of lawyer Pritchard to prevent the foreclosure. Prichard advised plaintiff he had no legal recourse against Sims, but he, Prichard would help plaintiff secure a loan. On February 6, 1969 Pritchard wrote plaintiff that payoff on the Sims note would require $13,009.81, and the best loan which could be expected was a six months loan at 10%. On February 13, 1969 Pritchard wrote plaintiff he had discussed the matter with a wealthy individual he had placed loans with before, and that "he was leary of making a loan for $13,009.81 * * * however, he agreed to advance such funds provided the property is deeded to him, and he will give you a written option to repurchase for $13,660.30". Pritchard thereafter told plaintiffs the transaction was a loan, but that it was necessary to handle the loan in this manner, "because of the homestead law".

It was thereafter agreed that defendant would provide $15,000 and that the amount returnable to him at the end of 6 months would be $15,750. Out of the $15,000 provided by defendant $13,041.42 was paid Sims; $94.89 was paid for taxes; $132. paid for title policy; $440. paid Pritchard for attorneys fee; and $1291.50 turned over to plaintiffs. Plaintiffs executed a deed to defendant to the property, and defendant and plaintiffs executed an option contract whereby plaintiffs could repurchase the property for $15,750 up to 180 days from February 25, 1969.

As the 180 day period began to run out plaintiff applied to lawyer Pritchard for an extension. Pritchard advised he would have to talk with defendant Johnson. The matter had not been resolved by August 21, 1969 when plaintiff came to Dallas to see what could be done. He could not get an answer from Pritchard. On August 25 Pritchard advised plaintiff that Johnson would give no extensions. Plaintiff secured present counsel and raised $15,750. in cash, and on August 26 took same to Johnson's office which was closed; then went to Johnson's house to tender the money, where Johnson's wife told plaintiff that Johnson was out of town, and that lawyer Pritchard took care of his business. (Johnson contends the tender was one day late).

Lawyer Pritchard prepared all papers. Defendant Johnson testified that he was reluctant to advance the $15,000. but "went ahead and made a deal on it anyway, on the basis if I lost (Pritchard) would pay half of it". Q: That was your agreement with Mr. Pritchard. A: Yes and "On the other hand Mr. Pritchard was to get one half of the profit if we made any money." The record reflects that Pritchard thereafter gave Johnson a check for $7875. for "undivided interest" in "property located at 13211 Emily", and Johnson wrote Pritchard "This will confirm the fact that you have paid me in full for an undivided one-half interest in the property".

[1, 2] A litigant's direct unqualified testimony regarding his personal knowledge is binding on him, and defendant Johnson testified that Pritchard had a one-half interest in the transaction from the outset. Pritchard and defendant Johnson were partners in the transaction and Pritchard's knowledge or what he should have known, is binding on defendant Johnson. And the record discloses Pritchard and Johnson had participated together in other lending transactions; that Pritchard was Johnson's personal lawyer, and Johnson testified he "asks his (Pritchard) advice on any matter pertaining to property we own together or I own".

There is circumstantial evidence that lawyer Pritchard did in fact keep defendant Johnson fully advised and that defendant "should have known" and probably actually knew of the representations made to plaintiffs and of plaintiff's intentions as to the transaction. In any event, Pritchard and Johnson were and are partners in the transaction, and Pritchard's knowledge is binding on Johnson.

[3] The record further discloses that a Mrs. Burns was renting the property from plaintiffs for $50. per month; that on August 28, 1969 lawyer Pritchard notified Mrs. Burns to pay the rent thereafter to defendant Johnson; that she paid to Johnson one month, and thereafter resumed paying rent to plaintiffs. Defendant Johnson, though he has a deed to the property since February 1969 did nothing to collect rent or exercise any possessory rights until August 28, 1969. This is strange conduct if he really considered he bought the property back in February. This is logical conduct if defendant only held a mortgage to the property. Retention of possession by plaintiff is a circumstance indicating a mortgage and not a sale. Wood v. DeWinter, Tex. Civ.App. (NWH) 280 S.W. 303; Ruffier v. Womack, 30 Tex. 332; Hubby v. Harris, 68 Tex. 91, 3 S.W. 558; Bemrod v. Heinzelman, Tex.Civ.App., Er.Dism., 263 S.W. 951.

[4] Finally the record reflects the property is worth $50,000. to $60,000. This is circumstantial evidence that defendant should have known that the transaction was intended to operate as a mortgage. Temple Nat. Bk. v. Warner, 92 Tex. 226, 47 S.W. 515; Moorhead v. Ellison, Er.Ref., 56 Tex. Civ.App. 444, 120 S.W. 1049; Norton v. Lee, Tex.Civ.App (NWH) 170 S.W. 267; Wood v. DeWinter, supra. See also: Bradshaw v. McDonald, 147 Tex. 455, 216 S.W. 2d 972; Wilbanks v. Wilbanks, Tex., 330 S.W.2d 607; Thigpen v. Locke, Tex. 363 S.W.2d 247; Maxey v. Citizens National Bank, Tex.Civ.App. (NWH), 432 S.W.2d 722.

[5] From the record as a whole we think the finding that defendant did not know or should not have known plaintiffs intended the instrument to operate as a mortgage is against the great weight and preponderance of the evidence. Plaintiffs' contention is sustained. In re Kings Estate, 150 Tex. 662, 244 S.W.2d 660.

The case is reversed and remanded. In view of the unlikelihood of other matters plaintiffs complain of arising on another trial, we do not pass on same.

Reversed and remanded.

Jim L. NAPPER and wife, Jo Ann Napper, Plaintiffs-Appellants,

v.

ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, etc., Defendants-Appellees.

No. 73-3746.

United States Court of Appeals, Fifth Circuit.

Sept. 16, 1974.

Plaintiffs brought diversity action against Texas law partnership and individual partners for alleged malpractice and alternatively sought to recover for alleged violation of Wire Fraud Act. The United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., dismissed for want of jurisdiction and the plaintiffs appealed. The Court of Appeals, Rives, Circuit Judge, held that Wire Fraud Act did not operate to create federal cause of action for damages, and that estoppel by judgment precluded plaintiffs from successfully asserting diversity jurisdiction where prior action filed against defendants by plaintiffs in another district court had been dismissed based upon determination that, as of date of removal of the prior action to federal district court, both plaintiffs and defendants were citizens of Texas and change of plaintiffs' citizenship between date of removal of the prior action and filing of complaint in present case had not been pleaded or proved.

Affirmed.

1. Telecommunications ⇐498

Wire Fraud Act did not operate to create federal cause of action for damages against defendants who were alleged to have violated the Act. 18 U.S.C.A. §§ 1341-1343.

2. Judgment ⇐649

Estoppel by judgment precluded plaintiffs from successfully asserting diversity jurisdiction in federal district court where another federal district court had dismissed prior action involving same parties based upon determination that, as of date of removal of the prior action to the federal court, both plaintiffs and defendants were citizens of Texas and plaintiffs failed to plead or prove that they had changed their citizenship between date of removal of the prior action and date on which subsequent action was filed, even though plaintiffs were not able to appeal from order remanding the prior action to state court.

3. Judgment ⇐720

Estoppel by judgment will not permit matters actually litigated and determined between same parties in one proceeding to be relitigated.

4. Judgment ⇐634

Estoppel by judgment is accurately termed "direct estoppel" where issue has actually been litigated and determined in an action between same parties based upon same cause of action.

See publication Words and Phrase for other judicial constructions and definitions.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and RIVES and DYER, Circuit Judges.

RIVES, Circuit Judge:

This appeal is from a judgment of the district court dismissing the case for want of jurisdiction and without prejudice. We affirm.

The complaint seeks the recovery of damages from a Dallas, Texas, law partnership and the individual partners for alleged

malpractice involving the validity and effect of a conveyance of the Napper's home in Dallas.[1] The first action asserting this claim was filed by plaintiffs on June 9, 1971, in the Circuit Court of Pulaski County, Arkansas. The complaint alleged that the cause of action arose in Arkansas, and sought to have the Arkansas state court acquire "long-arm" jurisdiction over the Texas defendants (See Arkansas Statutes 27-2502).

On July 12, 1971, defendants filed a petition for removal to the Federal District Court for the Eastern District of Arkansas asserting diversity jurisdiction that the plaintiffs were citizens of Arkansas and the defendants were citizens of Texas. Defendants then filed in the federal district court to which the case had been removed a motion to quash the "long-arm" service of process.

The next month, on August 23, 1971, the plaintiffs filed in the United States District Court for the Northern District of Texas a complaint in the present case, identical, except for minor grammatical changes, to the complaint pending in the federal district court in Arkansas. This complaint stated:

> "Plaintiffs are filing this suit as a precaution against having their cause dismissed after the running of the applicable limitations period. Plaintiffs request that the Court withhold proceedings hereon pending a ruling by the federal courts of Arkansas upon the jurisdictional question."

Plaintiffs based federal jurisdiction on diversity of citizenship, asserting that the defendants were all citizens of Texas and going into some detail as to their own citizenship:

> "Notwithstanding the fact that plaintiffs, Jim L. Napper and wife, Jo Ann Napper, own homestead property in Texas, they have established sufficient residence in the State of Arkansas to entitle them to invoke the diversity

1. The conveyance is that described in Napper v. Johnson, Tex.Civ. App.1971, 464 S.W.2d 496.

jurisdiction of the United States District Court for the Northern District of Texas."

The defendants on September 2, 1971, moved to dismiss plaintiffs' complaint for lack of jurisdiction, alleging:

"It affirmatively appears on the face of Plaintiffs' complaint that they are citizens and residents of Texas, as are the Defendants, so that no diversity of citizenship exists. In the alternative, if it does not affirmatively appear on the face of Plaintiffs' complaint that they are citizens of the State of Texas, then Defendants affirmatively assert that they are citizens of such state, so that there is no diversity of citizenship, and the Court has no jurisdiction over the cause of action asserted by Plaintiffs."

More than a year later, on November 21, 1972, the defendants filed in the federal district court in Arkansas a motion to dismiss for want of diversity jurisdiction, asserting plaintiffs to be citizens of the same state as were defendants, that is Texas. On May 9, 1973, a hearing was conducted on that motion to dismiss. The district judge found that the plaintiffs at the time of filing their complaint and since had the intention of going back to Texas. In part, the Judge said:

"The Court believes that his [Mr. Napper's] intention when he came here was not to make Arkansas his home on an indefinite basis, that that is what is absent and, therefore, he remained domiciled in Texas and remained a Texas citizen, although residing in Arkansas."

The case was accordingly remanded to the Circuit Court of Pulaski County, Arkansas. That state court never reached the merits, but ultimately sustained the defendants' motion to quash the "long-arm" service of process.

[1] On September 25, 1973, the plaintiffs filed in the present case an amended complaint reasserting the same claim based on diversity jurisdiction with the same allegations of citizenship. As an alternative claim, the plaintiffs sought to recover damages alleged to have resulted from violation by

the defendants of the wire fraud act, 18 U.S.C. § 1343.[2] The plaintiffs claim that violation of that criminal statute operates to create a federal cause of action for damages against the defendants, and assert jurisdiction under 28 U.S.C. § 1337.[3]

In Oppenheim v. Sterling, 1966, 368 F.2d 516, 518–519, the Tenth Circuit held that 18 U.S.C. §§ 1341, 1342, relating to mail fraud, are purely penal and rejected "the view that a violation of these penal statutes as such affords the court federal question jurisdiction in a civil case." The wire fraud act, 18 U.S.C. § 1343, is closely analogous to the mail fraud statute, 18 U.S.C. § 1341, and likewise evidences no intent of Congress to grant additional federal question jurisdiction in civil cases. Reitmeister v. Reitmeister, 2 Cir. 1947, 162 F.2d 691, does not persuade us differently.

[2–4] Estoppel by judgment precludes the plaintiffs from successfully asserting diversity jurisdiction. The distinction between res judicata and estoppel by judgment is discussed in Commissioner v. Sunnen, 1948, 333 U.S. 591, 597, 598, 68 S.Ct. 715, 92 L.Ed. 898. Estoppel by judgment will not permit matters actually litigated and determined between the same parties in one proceeding to be relitigated (333 U.S. at 598, 68 S.Ct. 715).[4] We agree with the full and amply supported

2. "§ 1343. *Fraud by wire, radio, or television*
"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

3. "§ 1337. *Commerce and anti-trust regulations*
"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

4. The estoppel by judgment is accurately termed "direct estoppel" where the issue is actually litigated and determined in an action between the same parties based upon the same cause of action. *See*

discussion in 1B Moore's Federal Practice ¶ 0.405[5], that

> "the underlying policy of res judicata is not restricted to a valid judgment that deals solely with the merits; it extends to and includes matters in abatement, such as jurisdiction of the subject matter, federal jurisdiction, jurisdiction over the res, jurisdiction over the defendant, venue, and related matters." (Footnotes omitted.)

As between the two federal district courts, the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the federal court in Arkansas to be relitigated in the second action. Johnson Company v. Wharton, 1894, 152 U.S. 252, 14 S.Ct. 608, 38 L.Ed. 429; see also the full discussion of and possible limitations to this rule in 1B Moore's Federal Practice ¶ 0.416[5].

The federal district court in Arkansas held that as of July 12, 1971, the date of removal, it lacked jurisdiction because plaintiffs were on that date citizens of Texas. To sustain federal jurisdiction in the Texas district court, plaintiffs had the burden of proving that they had changed their citizenship between July 12 and August 23, 1971, when their complaint in the present case was filed. Though afforded ample opportunity to do so, the plaintiffs have never pleaded or proved any change of citizenship during that crucial period. The district court properly dismissed the case for want of jurisdiction, and its judgment is

Affirmed.

A.L.I. Restatement, Judgments § 45 comment d; Estevez v. Nabers, 5 Cir. 1955, 219 F.2d 321, 324; Myers v. Ampex, Inc., 5 Cir. 1974, 498 F.2d 1092 [1974]; 46 Am.Jur.2d § 397, p. 566 n. 7. That distinction between "direct estoppel" and "collateral estoppel" helps to make clear our conclusion that neither the standards of law applied by the federal district court in Arkansas nor its findings of fact may be relitigated.